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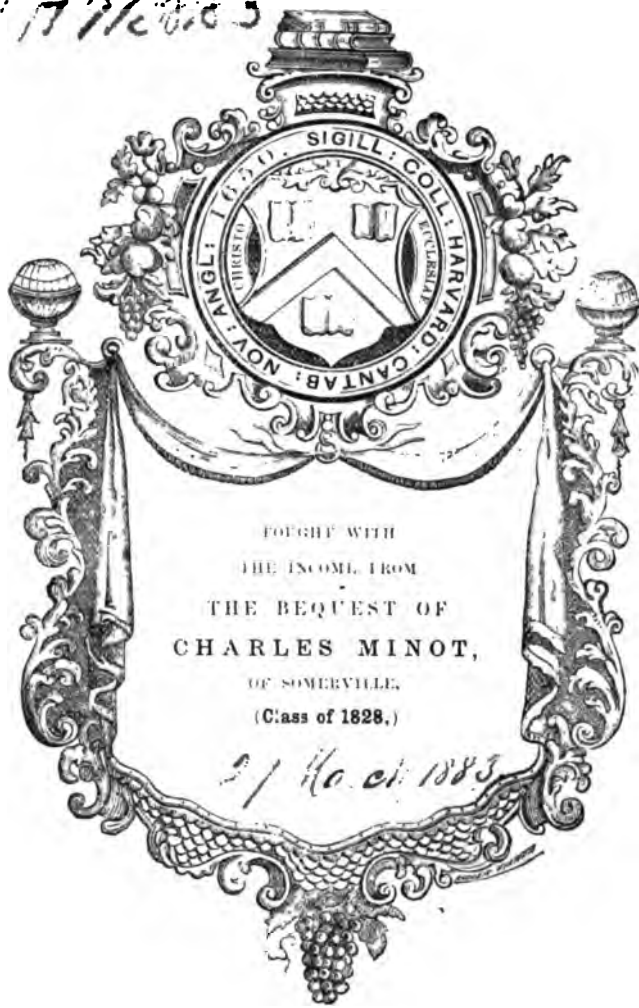
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HANDBOOK

OF THE

ROMAN LAW.

BY

DR. FERDINAND MACKELDEY,

PROFESSOR OF LAW IN THE UNIVERSITY OF BONN.

TRANSLATED AND EDITED BY

MOSES A. DROPSIE, Esq.,

FROM THE FOURTEENTH GERMAN EDITION.

TWO VOLUMES IN ONE.

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PREFACE.

It is not deemed necessary to say aught in praise of the work from which this translation has been made, it having been for many years before the continental jurists, and its merits greatly appreciated by European and by many American lawyers. It is invaluable for the student of the Roman law, as well as for those who have need to consult it; every doctrine, principle and rule is stated therein in the most pithy form, and the whole *Corpus Juris Civilis* is reduced to a short epitome. The editor, though often tempted to enlarge on the subject-matter, was deterred by the fear that the work would become too voluminous, and that they who desired to be further informed on particular objects would consult the sources or especial treatises thereon, the notes furnishing a guide where to seek.

The editors of the handbook since Mackeldey's death have added so greatly to the notes to each successive edition that in some cases they contain more matter than the text. This is especially true as to the insertion of historical matter respecting which, in some particulars, there are differences of opinion. The references to text-books have been greatly increased; these, together with the references to the sources, form a voluminous mass. It was deemed best to restore its character more nearly to that which the author gave to it, but to retain the learning that has been since produced.

The text of the fourteenth and last edition has been followed, excepting in some instances, when that of the thirteenth edition was preferred. No abridgment or omission has been made of the matter of the text. Whenever the superadded historical notes tended to illustrate the text they have been given in full; in some cases they have been abridged, and in others, where the editor who inserted them sought to enforce only his opinion in an historical controversy, they have been omitted. When a number of authors were cited for the same point, the most celebrated only and the latest of them are given. Usually the citations of monographs of certain objects have been preferred to general treatises, though frequently both are given, only a needless array of authorities has been avoided. All the citations from the Jus-

tinian and Antejustinian sources have been retained, and most of them have been verified. The technical Latin terms have been Englished, but not in cases where those terms are well understood by English lawyers. The transcription of passages from the *Corpus Juris* has been generally avoided, but, when given, the Latin is usually accompanied by an English translation.

The author, Ferdinand Mackeldey, was born in Brunswick, the capital of the duchy of that name, on November 5, 1784. He received the rudiments of a classical education in the gymnasium of that city. He continued his studies in the higher preparatory school of Helmstedt, a small town situated a few miles from Brunswick. He afterwards proceeded, to complete his preparation for the academical course, to the Lyceum Carolinum.

Mackeldey, when prepared, returned at the age of eighteen to Helmstedt, in order to prosecute in the state university there the study of jurisprudence, which he had adopted for his profession.

In the year 1806, having completed his academical course, he obtained the degree of *doctor utriusque juris*. The treatise which he wrote for the occasion was published under the title *Dissertatio inauguralis quatenus actio de recepto contra aurigas et curatores mercium seu speditores competat*. It bears evidence of his talents and learning. Following the bent of his inclinations, in the same year he entered on the practice of law. Though in addition thereto he at the same time gave lectures as a private instructor in the University of Helmstedt, it was not his original intention to make academical instruction his profession, but this was changed by circumstances which he could not control. In the year 1807, without any previous sickness, he was suddenly afflicted with deafness, from which he never recovered. To this misfortune, which was a great impediment to the pursuit of practical business, were added the political occurrences of that period, which led to great changes in the administration of justice, and among them the introduction of public and oral, instead of secret and written, proceedings in the law courts. Thus Mackeldey was compelled to forego his desire to devote himself to practice in the courts, and instead to adopt the vocation of academical teacher.

The great praise given to his lectures as a private instructor, the excellence of his personal character, and his profound scientific attainments, could not fail to procure for him the favor and esteem of the members of the juridical faculty, and thus was opened the way to his appointment, as early as the year 1808, to a professorship of law in the University of Helmstedt. In 1809

this institution was suppressed by the French government, which in the same year removed him to the University of Marburg, a town in the electoral principality of Hesse-Cassel, then incorporated into the temporary kingdom of Westphalia. In the year following he published, in connection with Ed. Schrader (since celebrated as a writer on law and as a professor of law in Tübingen), a brief view of the system of Justinian's Pandects, after the plan of Hellfeld's Manual, bearing the title *Ed. Schrader et Ferd. Mackeldey, Conspectus Digestorum in ordinem redactorem ad Hellfeldii Jurisprudentiam forensem*, etc., Helmstedt, 1810.

In the year 1811 Mackeldey was promoted to the rank of ordinary professor of law in the University of Marburg, and in the same year he published his treatise entitled *Theorie der Erbfolgeordnung nach Napoleon's Gesetzbuch*, Marburg, 1811. (Theory of Inheritance Succession according to the Code Napoleon.) A brief pause now occurred in his literary publications, but only to distinguish more brilliantly the period of his residence at Marburg, for there it was he prepared for the press the work now offered to the public in English. It did not appear till the year 1814.

Though Mackeldey, by his previous writings and by his efficiency as a public teacher, had already obtained distinguished consideration, the appearance of the handbook, in which the copiousness of his learning is displayed in such a masterly manner, enhanced his reputation greatly, and the numerous editions which were called for in rapid succession show that his fame had become established. He received in consequence, in the year 1819, a call to a professorship of law in the then newly-established University of Bonn, which he accepted, and two years afterwards he was appointed president of the *Collegium Juridicum*,¹ in that university.

But at length, desiring to devote himself more exclusively to the duties of his office and to his literary labors, he resigned the presidency, after having performed the duties of that office for seven years. From that time forth his attention was given to many departments of jurisprudence, as is shown by his numerous writings during the remaining seven years of his life, in which he also employed his time for the improvement of the successive editions of his handbook. Thus there were written by him, at brief intervals, the following: *Grundriss zu Vorlesungen über gemeines Deutsches Lehnrecht*, Bonn, 1828 (Elementary Lectures on the German customary law of feuds);

¹ A body composed of the professors of the law faculty, for deciding questions submitted to them by the courts and for giving counsel in difficult cases.

Dissertatio de ordinum provincialium in Germania origine, Bonn, 1832; Rechtliche Erörterung der Frage: ob der § 71 der Kurhessischen Verfassungs Urkunde, auch auf den Deputirten der Landes Universität (Marburg) zu beziehen sei, oder nicht (published anonymously, Bonn, 1833) (Legal Discussion of the question whether § 71 of the Constitution of Electoral Hesse is also to be applied to the Deputies of the State University, or not); Grundriss zu Vorlesungen über den gemeinen Deutschen und Preussischen Civil Procesz, Bonn; 1833 (Elementary Lectures on the common German and Prussian Civil Procedure); Grundriss des Erbrechts, Bonn, 1835 (Elements of the Law of Inheritance), and Excursus über einzelne Rechtsmaterien (Preliminary Sketches on several law matters), Bonn, 1835. The last two writings were published soon after his death, which occurred October 20, 1834, shortly before the completion of his fiftieth year.

It will thus be seen that Mackeldey's investigations had a wide range in the law. The present handbook appeared originally in the year 1814, under the title of *Lehrbuch der Institutionen des heutigen Römischen Rechts*. The second edition, entirely rewritten, was published in 1818; and in it the title was changed to its present one of *Lehrbuch des heutigen Römischen Rechts*. The third edition, enlarged and improved, appeared in 1820. The fourth edition, revised and enlarged by the addition of the enumeration of the Roman law literature (contained pp. 97–116 of the present edition), and divided into two volumes, the form which the work has since retained, was published in 1822. The fifth edition appeared in 1823, and the sixth in 1825; both of them much improved and enlarged, but still retaining the Institutional system adopted in the first edition. In the seventh edition, which appeared in 1827, the system of Institutes was replaced by that which will be found described in § 235. In the eighth edition, published in 1829, the doctrine of bankruptcy was added. The ninth edition, revised and still further enlarged, appeared in 1831; the tenth, greatly improved, in 1833. The eleventh and twelfth editions were published after Mackeldey's death, in 1837 and 1842, edited by Dr. Rosshirt, Professor of Law in the University of Heidelberg. The thirteenth and fourteenth editions were published in 1851 and 1862, edited by Dr. Fritz, Professor of Law in the University of Freiburg.

The reception which this work of Mackeldey met with in Germany soon attracted the attention of foreign jurists, and about ten years after its first publication, there appeared a French translation of the Introduction,

under the title *Introduction a l'étude du Droit Romain*; traduite de l'allemand de M. F. Mackeldey, par M. L. Etienne, Paris, 1825. Another French translation: *Revue, augmentée, précédée d'un précis encyclopédique, et suivie d'une nouvelle restitution de la Loi des XII. tables et de l'edit Perpetuel*, par M. L. A. Warnkönig, Mons, 1826. A third French translation of the Introduction is by F. F. Poncelet, Professor to the Faculty of Law of Paris, a second edition of which, revised, preceded by a preliminary discourse on the history of law, and edited by C. Seruzier, appeared in Paris, 1846. And an edition of a French translation of the entire handbook, translated by J. Beving, Avocat à la Cour d'Appel de Bruxelles, was published in Brussels, 1846. There also appeared a Spanish translation, based on the French one, and entitled *Introduccion al estudio del Derecho Romano extractado de los Elementos de Mackeldey*, por D. L. Collantes Bustamente, Madrid, 1829. (With an Appendix on the Influence of the Roman Law on Spanish Jurisprudence.)

There appeared afterwards another Spanish translation of the entire handbook, entitled *Manual de Derecho Romano, que comprende la teoria de la Instituta precedida de una introduccion al estudio de este derecho*. Por F. Mackeldey. Por Don Eduardo Gomez Santa Maria, Madrid, 1847.

A complete translation of the entire work into the Russian language, edited by Nichol Roshdestwensky, was published in two volumes, St. Petersburg, 1829 and 1830, containing some additions relating to the Roman law in Russia.

The handbook also appeared in Greek, under the title of *Φερδ. Μακκελδέυ, Ἐνχειρίδιον τοῦ Ρωμαϊκοῦ. δικαίου. Μεταφρασθὲν ἐκ τοῦ Γερμανικοῦ ὑπο Γ. Α. Παλλη καὶ Μ. Πενιεργ.* Athens, 1838.

It was also translated into Latin, bearing the title of *Systema Juris Romani Hodie usitati*, by Ernestus Eduardus Hindenburg, Juris Utriusque Doctor Lipsiensis, Leipsic, 1847. It was also translated into Italian by V. Ricci, with an appendix, two volumes, Milan, 1866, 8vo. An admirable translation of a part of the twelfth edition (Introduction and Special Part) into English, and enriched with notes, was made by Philip Ignatius Kaufman, Ph.D. of the University of Freiburg. and published in New York in 1845. It was intended to translate and publish the remainder of the work, but this was not done.

The whole work is now given to the public in English. It has been the translator's and editor's aim to present it in such form and language as would

be best understood by an English lawyer, yet maintaining the spirit of the original, and to insure correctness the sources of the Roman law, commentaries and treatises thereon, have been consulted for every section of the work, involving much time and great labor.

It is believed that this work will fill a gap in English legal literature and supply a want long felt. It will facilitate those who are familiar with the Roman law in the ascertainment of its principles and readily guide them to its sources and literature, and it will unfold to those who are not familiar with it the knowledge of a body of laws developed and improved by the most learned jurists, through a long succession of ages, into a scientific system characterized by richness of illustration, logical precision and profound philosophy.

MOSES A. DROPSIE.

PHILADELPHIA, *March* 1, 1883.

HANDBOOK OF THE ROMAN LAW.

By DR. FERDINAND MACKELDEY.

TRANSLATED AND EDITED BY MOSES A. DROPSIE, Esq.

VOLUME FIRST.

INTRODUCTION AND GENERAL PART.

INTRODUCTION.

FIRST DIVISION.

GENERAL NOTION OF LAW AND JURISPRUDENCE.

OF LAW IN GENERAL.

§ 1. Every general rule that must necessarily be obeyed is termed law. A law is either *physical* or *natural*, as when it rests upon a necessity of nature so that it cannot be resisted; or *moral* or of *liberty*, when it is founded upon reason, to which resistance is possible but is forbidden. The law of nature, therefore, determines the *physical* possibility and necessity of actions (power and necessity), while moral laws determine the *moral* possibility and necessity of actions (freewill and obligation). Jurisprudence deals only with the moral laws that regulate the free action of man.

LAW IN REGARD TO THE FREE ACTION OF MAN.

§ 2. The moral law or law of liberty is in part compulsory law or law of right and in part moral law in a narrow sense. Compulsory laws or laws of right are those which the government of the state can by force compel the people therein to observe. Moral laws in their narrow sense are those in which no external force is permitted to compel their observance. The laws of the first kind form law (*jus*) in its *objective* sense (*Jus est norma agendi*; law is a rule of conduct). The possibility resulting from law in this sense, to do or require another to do, is law in its *subjective* sense (*Jus est facultas agendi*; law is a license to act). The voluntary action of man in conformity with the precepts of law is called justice (*justitia*).¹

A. JUS IN ITS OBJECTIVE SENSE.

1. *Natural and Positive Law.*

§ 3. *Jus* (law) in its *objective* sense is generally divided, according to its basis, into natural and positive law. By *natural* law is understood the law derived from abstract reason, or the doctrine of the general and necessary conditions upon which the external liberty of each individual may comport with the liberty of the whole community. It is sometimes called the *doctrine*

¹ pr. I. 1. 1. "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*;" fr. 1. pr. § 1. fr. 10. pr. D. 1. 1.

of philosophical law or metaphysics of the law, but it is not synonymous with the philosophy of positive law (§ 9, *infra*). Positive law, on the contrary, is derived from historical facts or the notion of those principles which in a state are acknowledged as principles of law and consequently have authority as such.¹ Hence the foundation of all positive law consists in the acknowledgment and observance by a nation of facts and principles as law, and upon it, in every nation, the manners, the character of the people, religion, form of government, as well as many incidents and casual events, exercise the greatest influence.

Sources of the positive Law.

§ 4. The positive law of every nation rests, with respect to its origin and sources, partly upon express laws, dictated by the supreme power of the state. and partly upon usage and custom.

a. Express Law.

§ 5. Law in its most narrow sense is a precept issued by the supreme power of the state, for its subjects to obey; it is therefore founded on the legislative will. In order to obtain its binding force, it is necessary that it be made known to those for the regulation of whose conduct it is intended. This publication of the law which is made by the supreme power of the state, for the purpose of its being obeyed, is called *promulgatio legis* (publication of the law),² and may be effected in various ways. Laws have no binding force before their publication, consequently as a general rule they are effectual only for the future, not for the past (*lex nova ad præterita trahi nequit*).³

b. Law of Custom.

§ 6. Positive laws do not emanate merely from the enactment of the legislature, but a great many of its principles and maxims originate and are formed, in all times and in all nations, by the opinions and manners of the people.⁴ All of those legal rules which have been introduced in this manner are termed the *law of custom* or *usage*,⁵ and such law⁶ has equal force with express law.

¹ This distinction must not be confounded with the Roman *jus naturale s. gentium* and *civile* (law of nature or nations and civil law), or between the law of nature, the law of nations and the civil law, treated of in § 35, *infra*, and in note 2, page 22; and especially in § 125, *infra*.

² In the time of the republic the Romans understood by "promulgare legem" to make the proposal of a law publicly known, so that every one might consider it before it was voted on in the *comitia*. But Justinian uses the expression according to its present meaning. Proem. *Inst.*, § 1.

³ Const. 7. c. 1. 14: Novel 22. cap. 1: Novel 66. cap. 1. § 4.

⁴ This view as to the origin of positive law was also entertained by the Romans. Quinctilian. *Inst. orat.* 3. 3: fr. 32. pr. fr. 33. fr. 33. fr. 40. D. 1. 3.

⁵ Cicero *de invent.* 2. 22.

⁶ The scientific treatment and development of law already existing has, according to the nature of the subject-matter, great influence on the origin of such law of custom. But in the Roman state there was a time in which a class of opinions of

But such customs must not be contrary to reason, good manners or the public weal.¹

Preference of the later Law.

§ 7. Since the law of a state is developed only gradually and undergoes frequent alterations in the lapse of time,² it follows as a matter of course that with regard to the validity and practical application, the later law, whether it arose from enactment or from custom, has the preference over the earlier;³ this is expressed by the maxim *Lex posterior* (better *jus posterius*) *derogat priori*.⁴

PUBLIC AND PRIVATE LAW.

§ 8. With respect to its object all positive law may be divided into public and private law. The public law (*jus publicum*) comprehends those rules of law which relate to the constitution and government of the state, that is, the relation of the highest power to the people. The private law (*jus privatum*) comprehends those rules of law which pertain to the legal relations of the people among themselves.⁵

JURISPRUDENCE.

§ 9. Jurisprudence is the science of compulsory laws with their reasons and sources combined with their philosophy and history.⁶ The simple knowledge of laws without these lacks the scientific requisites of jurisprudence, as is exemplified by the following questions and answers:

1. What is the notion of law? This is answered by the doctrines of philosophical law or the law of nature (§ 3, *supra*).

2. What is actual law? This question is the object of positive jurisprudence, and may be subdivided into the following questions: a. What are the present provisions of the law of the state? This is answered by the dogmas of the law. b. How did these provisions originate? This is taught by legal history. c. Are those provisions reasonable? This is answered by investigating the philosophy of positive law.

certain authorized jurisconsults, so far as they agreed with each other, had the force of law. See *infra*, § 50.

¹ § 9. I. 1. 2; fr. 32. § 1. D. 1. 3; fr. 39. D. 1. 3; Const. 2. C. 8. 53; Novel 134. c. 1.

² § 11. I. 1. 2.

³ fr. 4. D. 1. 4; fr. 32, § 1. D. 1. 3. "Quare rectissime etiam illud receptum est, ut *leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per consuetudinem abrogentur*." The preceding passage seems to be contradicted by Const. 2. C. 8. 53, which says: "Consuetudinis ususque longævi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem." But the words "aut legem" do not here signify every law, but, rather only such a law as absolutely commands or prohibits something for the public welfare, whereby the subject is deprived of his self-action, as it is expressed in the Roman law, *jus publicum, quod pactis privatorum mutari non potest*. fr. 38. D. 2. 14; fr. 3. D. 28. 1.

⁴ *Thibaut*, civil Abb. No. 7.

⁵ § 4. I. 1. 1; fr. 1. § 2. D. 1. 1.

⁶ § 1. I. 1. 1; fr. 1. pr. § 1. D. 1. 1.

B. RIGHTS IN A SUBJECTIVE SENSE.

1. *Rights and Duties.*

§ 10. Right (*jus*), in its subjective sense (§ 2, *supra*), corresponds to obligation (*officium* (voluntary), but not *obligatio*).¹ A right, in its subjective sense, is the authority to do or demand something—it corresponds to duty; by duty is understood the control imposed on our actions by reason. For in like manner, as a right in a subjective sense founds a moral *possibility* or freewill, so an obligation founds a moral *necessity* or compulsion. Right and duty are correlative and inseparable; one cannot exist without the other.

2. *Perfect and imperfect Duties.*

§ 11. The obligation of one, to which another has a right, is called *duty*. The term duty has a wider signification than the term obligation. There are, also, duties which are not imposed in consequence of a right in its objective sense and which also do not spring from a right in its subjective sense, but are imposed by the law of morals. The fulfillment of these duties cannot, as in the case of proper obligations, be externally enforced, hence they are termed imperfect, charitable or conscientious duties; while obligations are termed perfect or compulsory duties.²

3. *Perfect and imperfect Rights.*

§ 12. In the same manner as perfect and imperfect duties differ, the corresponding rights differ. That right to which an imperfect duty corresponds is an *imperfect* or moral right; on the other hand, that right to which a perfect duty corresponds is a *perfect* right—that is, a right in its proper sense—a juridical or legal right. Jurisprudence embraces only the latter kind of rights; imperfect rights and duties belong to the sphere of morals.

4. *Maintenance of juridical Rights by the State.*

§ 13. The idea of a perfect right presumes that he on whom it is conferred must be enabled to maintain it by force. But this force cannot be exercised by himself, because, whether a right has been violated cannot be left to the decision of him who alleges that he has suffered such violation, and because he who has suffered a violation of a right does not always possess the physical power required to enforce his right against the offender. The compulsion, therefore, can be exercised only by the supreme power of a state which has

¹ The Romans do not assign to *obligatio* the meaning that we give to obligation generally, but they understand it in our sense of claims and debts. See § 360, *infra*.

² The Romans had no especial terms to distinguish perfect duties from imperfect. The word *officium* was used for both. To denote a perfect duty they used *cogendus est, tenetur, necesse est* or *habet, debet* or *debetur*. The modern terms are *obligatio perfecta, necessitas legitima, officium jure impositum*, etc.

been constituted for the purpose of maintaining the rights and liberties of one against the violations and attacks of another. This is legal or juridical compulsion, and as such compulsion is only possible in a state; without a state, juridical relations among men cannot exist.

5. *Subjects and Objects of Rights.*

§ 14. To every right there is a subject and an object. The subject of a right is the person on whom a right is conferred; the object of a right is the matter to which it relates. The objects of rights extend only to external actions, because it is only in relation to these that a restriction of human freedom or compulsion can take place, while internal actions can neither be hindered nor enforced by others.

6. *General Classification of Rights.*

§ 15. The rights recognized and maintained by a state in relation to its individual members are:

1. Such as relate to the legal capacity of the individual, that is, to those personal qualities without which one is not acknowledged to be a subject of rights, or at least not the subject of certain kinds of rights.

2. Such as, assuming the legal capacity of the individual, concern his family relations.

3. Such as relate to the estate of a person, and are subdivided into: a. *real* rights, when they concern things subject to one's power and dominion; b. *personal* rights (demands), when they relate to performance due from persons obliged. Right of legal capacity, family rights and real rights are *absolute*, that is, they are rights which every one can be required to respect, and may therefore be enforced against any one who contests or invades them. Personal rights and rights of demand are only relative; they can be enforced only against the person obliged.

7. *General Classification of Duties.*

§ 16. The duty which corresponds to a right is either a *general negative* or a *special positive* duty. The former is enjoined on all men except him on whom the right is conferred, and consists in allowing him the unobstructed exercise and enjoyment of his right; the latter is enjoined on certain persons only, and consists in their performing what he who has the right is by virtue thereof entitled to demand from them. The former, therefore, corresponds particularly to *absolute*, the latter to *relative* rights.

8. *Actions and Exceptions.*

§ 17. He who has acquired rights may, should they be contested, enforce them by process of law. To the means for prosecuting and enforcing rights belong particularly actions (*actiones*) and exceptions (*exceptiones*) (§§ 206, 216, *infra*).

SECOND DIVISION.

HISTORY OF THE SOURCES OF THE ROMAN LAW.

I. ROMAN LAW AND ITS HISTORY.

§ 18. The Roman law in general comprehends the laws which prevailed among the Romans, without regard to the time of their origin.¹ The history of this law is now commonly divided into *external* and *internal*. The former treats only of the sources and literature of the law; the latter treats of the matter contained in the sources, the destiny of the juridical doctrines with respect to their origin, their gradual development and changes.²

II. SOURCES OF THE HISTORY OF THE ROMAN LAW.

§ 19. The sources of the history of the Roman law are :

1. The earlier and later Roman law collections themselves, together with the decrees of their publication.

2. All the documents of the older laws and legal transactions which have reached us, though in a fragmentary state, such as the *senatusconsultum de Bacchanalibus* (A. U. C. 568), the fragment of a *Lex agraria* (A. U. C. 643), which was supposed to be the *Lex Thoria*, and a *Lex repetundarum*, likewise the so-termed *Tabula Heracleensis*, the fragment of the *Lex Rubria de Gallia cisalpina*, the fragment of the so-termed S. C. *de imperio Vespasiani* (A. U. C. 823), the *leges municipales* for the cities Salpensa and Malaca in Spain (A. U. C. 835-837), the document of gift of *T. Flavius Syntrophus*, the *Obligatio prædiorum*, which was usually wrongly named *Tabula Trojani alimentaria* (A. U. C. 856), and the fragment of the testament of *Dasumius*.

3. Also many of the ancient Grecian and Roman juridical and non-juridical writers. The few writings of the Roman jurists that have reached us, and the manuscripts of them that up to this time have been discovered, will be more particularly mentioned in §§ 54, 55, 66, *infra*. The following deserve to be particularly noticed: the legal history (external) of Pomponius in fr. 2. D. de orig. jur. (1. 2.), the Institutes of Gaius, the fragment of Ulpian (§ 54, *infra*), and the Greek paraphrase of Justinian's Institutes by Theophilus (§ 76, *infra*). Among the non-juridical writers the following contain the fullest information on this subject: Polybius, Dionysius of Halicarnassus, Cicero, Livy, Valerius Maximus, Tacitus, Plutarch, the elder and

¹ In a narrower sense the Germans understand by it merely the Justinian law as adopted by them.

² The history of the illustration of the law, which sometimes is regarded as a particular part of jurisprudence (juridical literary history) different from legal history, so far as relates to the Roman law and the time till Justinian, appears as a part of the external history of the law, because the private labors of classical jurists have been given the character of sources of the law. See § 20, *infra*.

younger Pliny, Suetonius, the *Scriptores historię Augustę*, Johannes of Lydia; also the grammarians, especially Varro, Asconius Pedianus, Gellius, and, at a later period, Sextus Pompeius Festus, Servius and Boëthius, the *scriptores rei rusticę agrimensores*, especially Varro already mentioned, and the *agrimensors* (surveyors) or *scriptores rei agrarię*.

III. PERIODS OF THE HISTORY OF THE ROMAN LAW.

§ 20. The divisions best adapted to the history of the sources of the Roman law and of their development are those which were first chosen by Gibbon,¹ and afterwards adopted by Hugo. They are: First period, from the foundation of Rome to the adoption of the twelve tables; Second period, thence to Cicero; Third period, from Cicero to Alexander Severus; Fourth period, from Alexander Severus to Justinian.

FIRST PERIOD.

FROM THE FOUNDATION OF ROME TO THE TWELVE TABLES.

(A. U. C. (year of the foundation of the city) 1–300 of Rome, before Christ 750–450.)

The oldest Constitution of Rome.

§ 21. The Roman state from its formation for several centuries was a limited monarchy, at the head of which was a chief elected for life, termed *Rex*; beside him was a senate. The election of the king, and especially the acceptance of the laws which he or his representative proposed (*legem ferre*),² belonged to the *comitia* (national assemblies). In these the voting was according to the thirty *curia* (*comitia curiata*) into which the members of the three tribes of ancient Rome (*Ramnes*, *Tities* and *Luceres*) were divided. The observance of the religious rules respecting state affairs was in the care of the college of pontiffs under the presidency of the *Pontifex maximus*, and important transactions of state were only permissible after the ascertainment of the auspices by the augurs. The patricians only had political rights. The other citizens were not only excluded from the offices of senators and priests, but also from the *comitia*; this was not only true of the freedmen, of their successors, and of clients of single patricians, but also of others, though they were wealthy citizens, if they did not by their descent belong to one of the three tribes, and were not especially raised to the rank of patricians. The

¹ Gibbon, History of the decline and fall of the Roman empire, chap. 44, which contains an historical survey of the Roman law, and has been separately translated into German by Hugo, Göttingen, 1789. The French translation by Guizot has been revised by Warnkönig, accompanied with the annotations of both, was published under the title *Précis de l'histoire du droit Romain par Gibbon*, Liège, 1821.

² *Legem ferre* among the Romans did not mean to give a law, but to propose one to the people, and was synonymous with *rogare legem* or *rogationem ferre*. Of him whose proposal was adopted they said *pertulit legem*. See Heineccius, Antiq. Rom. lib. 1. tit. 2. On the co operation of the senate compare Livy, L. 1. c. 17; Dionys. Halic. II. 14. IV. 2. IX. 14.

non-patrician citizens of the latter kind were termed plebeians. Their number was gradually greatly increased by the incorporation of neighboring territories into the Roman state.¹ The king Servius Tullius, who in relation to the plebeians divided the citizens into local tribes (§ 27, *infra*), introduced a new arrangement of taxes, of the army and of the *comitia*, to the effect that the patricians and plebeians must participate in the designated burdens and rights according to the proportion of their property, their birth and their age. In every five years a census of the entire people was to be taken and to be divided into classes according to their property,² and thereof was to be made the division into centuries for the army and for a new kind of *comitia* (*comitia centuriata*).³ The execution of these important reforms was probably hindered by the violent death of the king, at least so far as regards the *comitia*.⁴ It is thought that the ancient *leges curiatæ*⁵ were collected by a certain Sextus or Publius Papirius, *pontifex maximus* at the time of Tarquin, the last of the kings.⁶ We have very few fragments of this collection, and even they are doubtful.⁷

¹ Respecting the beginning and the original position of the plebeians and the clients, see *Niebuhr*, Roman Hist., and *Mommsen*, Roman Hist.

² According to Livy and Dionysius (see note 3) it was requisite, to be placed in the first class, to have 100,000 *asses*; in the second, 75,000; in the third, 50,000; in the fourth, 25,000; in the fifth, according to Livy, 11,000; according to Dionysius, 12,500. They who had less property, according to Livy, belonged to no class; according to Dionysius, they formed the sixth class. However the original sums were only one-fifth of the above, and after the *as*, which originally contained one pound of copper, was struck of a much lighter weight, the sums were increased five-fold.

³ The citizens of the first class furnished eighty centuries of footmen; the second, third and fourth classes furnished twenty centuries each; the fifth class, thirty centuries. In all these classes one half was *seniores* (men of at least 45 years) and the other half *juniores*. Certain classes had also to equip centuries of military artisans and musicians. The cavalry were taken exclusively from the leading people, namely, six centuries from the patricians and twelve centuries from the leading plebeians. Thus regard was had to property, age and rank in this classification. See Livy, I. 43; Dionys. IV. 16; Gellius, X. 28; Servius ad Virgilii *Æn.* VII. 716. Cicero de Republ. II. 22, appears to be incorrect.

⁴ Cicero de Republ. 2. 31; Livy, lib. 1, cap. 20.

⁵ They perhaps were also called *Leges regie* when the proposal was made by the king. Cicero de Republ. II. 13-21, V. 2; Livy, lib. 40, cap. 29, speaks of a collection of the laws of Numa, which it is said had been discovered in later times, but was suppressed by the senate from political motives.

⁶ This collection was afterwards called *jus civile Papirianum*, fr. 2. § 2. D. 1. 2. It was also called *Lex Papiria*: Servius ad Virgil. *Æn.* XII. 836. The jurist Granius Flaccus wrote a commentary on it as late as the time of Julius Cæsar, which manifestly is not identical with his theological work *de indigitamentis*. Glück, *de jure civili Papiriano*. In his works fasc. 2; Daunou, sur le droit Papirien, in the *Thémis*, T. 5, p. 251.

⁷ They are in *Hoffmann*, *Histor. Juris*. Vol. II. P. 1. p. 1. See also *Terrasson*, *Histoire de la Jurisprudence Romaine*, p. 22.

At the Time of the Republic.

§ 22. After the kings were expelled (A. U. C. 244), Rome became a republic and two consuls took the place of the king. They were always elected annually and could only be chosen from the patricians, and their power of punishment was greatly diminished. Notwithstanding the *comitia* of the centuries, in which the plebeians had the right of voting, was now established, though it may have existed previously, under the new government the patricians had a great preponderance over their plebeian fellow-citizens, which they abused in greatly oppressing the latter. In consequence of which severe contests soon arose between these classes, and this caused the establishment of the tribunes of the people (*tribuni plebis*, A. U. C. 250), who were chosen from the plebeians to protect their rights against the assumptions of the patricians, whose persons were claimed to be sacred and inviolable (*sacrosancti*).¹ At first they had only the right to protest (*intercedere*) against the resolves of the consuls and the senate,² and to render them ineffective by their veto; but they soon after acquired the right, as chiefs of the plebeians, to propose laws to them in the *comitiis tributis*, on which the plebeians alone voted, and when approved by them were called *plebiscita*. Besides the tribunes, two other magistrates of their own were at the same time granted to the plebeians, viz.: the *ædiles*. These were aids to the tribunes by taking charge of the police and other matters relative to the public welfare, and certain buildings and archives were placed in their special care.³ From the other magistracies the plebeians continued to be excluded, and it was not till the second period that they gradually attained them.

The Twelve Tables.

§ 23. The contests between the patricians and plebeians, which still continued, produced at the close of this period (A. U. C. 300) the celebrated law of the twelve tables.⁴ The object of these tables was to fix the existing law

¹ Livy, lib. 2, cap. 32, 33; lib. 3, cap. 55; Niebuhr, Vol. I.

² Hence Cicero contra Rullum calls the tribunes "*præsidem libertatis custodemque*."

³ Dionys. Halic., lib. 6, cap. 90; Gellius, lib. 17, c. 21, § 11; Varro de ling. lat. lib. 4, cap. 14; Pomponius in fr. 2. § 20. 21. D. 1. 2. The office of *ædiles curules* originated at a later period (§ 29, *infra*). See Niebuhr, Vol. I.

⁴ The first proposal for it was made by the plebeian tribune (Gaius Terentius Arua) through the Lex Terentilla A. U. C. 292. The history of its origin is to be found in Livy, lib. 3, c. 9. 10. 31; see Cicero, de republica L. 2. c. 36. 37. On the twelve tables, see E. Ottonis, Diss. de legibus XII. tabularum; as a preface to his Thesaurus juris Romani T. 3, and in his Commentary ad Institutiones, Frankfurt and Leipsic, 1743, p. 617; Gibbon, History of the decline and fall of the Roman empire, chap. 44; Bonamy, Diss. sur l'origine des lois des XII. Tables, in the Mémoires de l'Académie des Inscriptions, Tom. 12; Serpiu Grataia, Oratio de Hermodoro Ephesio vero XII. tabb. auctore; in Annal. Acad. Groningen, 1816, 1817; S. Campi, Novum examen loci Liviani de Legatis missis. Wilna, 1821; W. A. Maciejowski, Legum Solonis et Decemviralium comparatio, et excursus ad Livii historiarum, lib. 3, cap. 34. In his Opusculorum sylloge 1, Warsaw, 1823; X. C. E. Lelièvre,

externally, and in this manner protect the individual, especially the plebeian, against the arbitrariness of the patrician judicial power, and at the same time to remove the inequality between the patricians and plebeians, and to reduce the discordant customs of the different citizens of the state into one national law.¹ This great law of the twelve tables, which was adopted in the *comitia centuriata*, and which, as a mark of distinction, was called simply *Lex*, or, after the commissioners chosen to prepare it, *decemviris legibus scribundis*, the *Lex decemviralis* (the law of the decemvirs), attained high authority, and remained through all succeeding time, till Justinian, the basis of the private law of the Romans.²

The Remains of the Twelve Tables.

§ 24. The twelve tables were publicly exposed before the *rostris*.³ After the pillage of Rome by the Gauls they were again collected,⁴ and they were found thus exposed in the third century of the Christian era.⁵ At present we have only fragments of them, found in Gaius's Commentary on them, of which there are, however, only twenty fragments in the Pandects; some were also found in Ulpian's Fragments and in the *Festus de verborum significatione*, in the restoration of which *Jacob Gothofredus* rendered great service.⁶ The lately-discovered Institutes of Gaius (note 6, page 35, *infra*), and the Vatican Fragments (§ 66, *infra*), have supplied some more genuine passages previously unknown. Not all of the passages contained in Cicero's works are genuine fragments, but mere circumscriptions and imitations of the twelve tables. For the later attempts to restore them we are indebted to Haubold, and especially to Dirksen.⁷

Comm. antiquaria de legum XII. tabb. patria, Louvain, 1827; *A. C. Cosman*, Diss. de origine et fontibus XII. tabb., Amsterdam, 1829; *Niebuhr*, Vol. 2.

¹ Livy, III. 54. 56.

² Cicero de leg. II. 23. de orat. I. 43. 44. In this last passage Cicero introduces Crassus as saying: "Bibliothecas mehercule omnium philosophorum unus mihi videntur XII. tabb. libellus superare." Livy, lib. 3, c. 34, calls them "The source of all public and private law." Tacitus, ann. lib. 3, cap. 27, "Finis æqui juris," that is, the equality of law in the highest degree to all Roman citizens. This passage, however, is understood very differently by some. See *Niebuhr*, Vol. 2.

³ Whether they were immediately, at the beginning, engraved on wood, ivory, or brass, is doubtful. Pomponius says, in fr. 2. § 4. D. 1. 2. of the first ten tables: "These were written on *eboreas* (ivory) tables and placed before the rostrum." For "*eboreas*" (ivory), Scaliger reads "*roboreas*" (oak). On the other hand, Dionysius, X. 60, says of the same ten tables that they were of brass; and Livy, III. 57, with whom Diodorus agrees in speaking of all of the tables, that they were engraved in brass. See Gibbon, chap. 44, *supra*.

⁴ Livy, VI. 1.

⁵ *Cypriani*, Epist. II. 4.

⁶ *J. Gothofred*, XII. Tabb. Heidelberg, 1616, enlarged in his *quatuor fontes juris civil.* Geneva, 1653; *Terrasson*, Histoire de la jurispr. rom., p. 54; *Bouchaud*, Commentaire sur la loi de douze tables, Paris, 1813; *J. H. Van der Heim*, de Jacobo Gothofredi meritis in restituendis XII. tabb. fragmenta, Leyden, 1823.

⁷ This attempt at restitution is found in *Haubold*, inst. jur. Rom. privati hist.

SECOND PERIOD.

FROM THE TWELVE TABLES TO THE TIME OF CICERO.

(A. U. C. 300–650, before the Christian Era 450–100.)

Extension of the Roman Dominion.

§ 25. During this period the Romans subjected to them first the whole of Italy and afterwards many other countries, and laid the basis for a kind of empire of the world—an *Orbis terrarum Romanis*. The relations in which the conquered countries were placed were very various.¹ The Italian states and their territories entered into the Roman state mostly only in the relation of dependent confederated states; they obtained their *comitia*; their senate,² and their magistracy chosen by themselves, and their inhabitants continued to be peregrines. On the other hand, the inhabitants of the conquered countries other than Italy, in which is also included upper Italy, under the name of *Gallia cisalpina*, became subjects of the Roman people, and the soil, so far as was permitted by previous ownership, became Roman property.³ The land and people were now governed by stateholders who were sent from Rome. True, the several cities had for their municipal matters their senate, but in general no especial magistracy, *e. g.*, having judicial authority, nor had they *comitia*. A country in this condition was called a province (*provincia*).

Change in the Status of the Patricians and Plebeians.

§ 26. The contest begun in the preceding period by the plebeians, for equality with the patricians, was persevered in. The plebeians soon acquired the *connubium* (right of marriage) with the patricians,⁴ and they gradually accomplished so many changes in the *comitia* that finally the patricians had no substantial advantage over them (§ 27, *infra*), and for the office of senator the distinction between them ceased (§ 28, *infra*). The plebeians gradually acquired the right to be elective to nearly all of the governmental and priestly offices (§ 29, *infra*). Thus the contradistinction between patricians and ple-

dogm. epitome, Leipsic, 1821, p. 129 (also in his instit. jur. Rom. priv. histor. dogm. lineam., ed. Otto, Leipsic, 1826, at the end); *H. E. Dirksen*, Uebersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf Tafel Fragmente, Leipzig, 1824. A reprint of the fragments as restored by Dirksen is in the French translation of the introduction to the present Manual of *Etienne* and *Warnkœnig*, p. 161; *W. Fischer*, Erläut. des Zwölf-tafelges., Einl. and Interpretat. der ersten Tafel, Tübingen, 1838; *R. Gnaist*, XII. Tabular. Fragments in his Institutionum et Regular. jur. rom. syntagma, Leipsic, 1858, p. 12, *seq.*

¹ See among the ancient writers especially, *Sigonius*, de antiquo jure populi Romani (see *infra*, § 122 V. A.). Among the modern writers, *Savigny*, Gesch. Röm. Rechts im Mittelalter, Vol. I. cap. 2.

² Such a senate was called *ordo curia*, and its members *decuriones*, *curiales*.

³ *Gaius*, II. § 7. 21. 31; *Theophil.* II. 1. § 40. C. un., C. 7. 31.

⁴ By the *lex Canuleja* of A. U. C. 309; *Livy*, IV. c. 1–6; *Dionys. Hal.* X. 60; *Cic. de Republ.* II. 37.

beians nearly wholly disappeared.¹ On the other hand, there arose a new aristocracy, mostly plebeian. The magistrates were chosen from the *nobiles* only, that is they whose ancestors had been clothed with *curule* honors. Thus the senators and their families, and those wealthy folk who were chosen as *equites*, with their families, formed two higher orders bearing the names *ordo senatorius* and *ordo equester s. equestris*, and those citizens who belonged to neither of these were called *plebs* and *plebei*, in a new sense, and also *ordo plebeius s. popularis*. Knighthood, especially, enjoyed public distinctions similar to the senatorship; it was the nursery of the senate;² it played an important part in the contests between the optimates and the common citizens;³ it drew mostly to itself the leasing of the taxes and other state revenues, which was not permitted to the senators; and, finally,⁴ from the knighthood, as the second order, the judges having criminal jurisdiction were taken, on the cessation of limiting their selection from senators only.⁵

Changes in the State Constitution.

1. *Comitia.*

§ 27. The authority of the state remained continuously divided between the *comitia*, the senate, and the magistracy. The college of priests maintained their influence over the exercise of such authority. But, in its distribution, important changes were effected, partly in consequence of the opposition of the orders and partly because of the extension of the Roman dominion. The *comitia curiata*, the most ancient kind of curia, did not wholly cease to exist on the introduction of the *comitia centuriata*. But soon thereafter⁶ they were only summoned in relation to religious consecrations, as in the case of many legal transactions,⁷ and in the case of the transfer of the imperium to a higher officer;⁸ but gradually they became a simple formal-

¹ Though the patricians retained some advantages, yet the plebeians only could become tribunes, and there could be two plebeian consuls, but not two patrician: Livy, VII. 42. See, Livy, VI. 20.

² Livy, XLII. 61.

³ See, e. g., Pliny, hist. nat. XXXIII. 2; Cicero, Phillipp. VII. 6. ad famil. XI. 16. pro Murena, c. 35; de petit. consul. c. 8.

⁴ They also usually undertook the building and supplies for the state: Cicero pro Plancio. c. 9; Livy, XXII. 18; XXIV. 18; XXV. 3; XLIII. 16; Pliny, *supra*.

⁵ The most ancient law of this kind is the *Lex Sempronia* of the year 631 U. C. Compare thereon Velleius Paterculus, II. 6. 13. 22; Polybius, VI. 15. 17; Appian. de bello civ. I. 22, with Plutarch C. Gracch. c. 5.

⁶ At the beginning all resolutions required the confirmation of the *comitia centuriata*: Cicero de lege agr. adv. Rullum II. 11.

⁷ Gaius, II. § 101; Gellius, V. 19; XV. 27; Tacitus, Hist. I. 15; Cicero pro domo c. 14. 15. 29; Sueton. Octavian. c. 65; Dio Cass. XXXVII. 51; XXXIX. 5; Theophil. II. 10. § 1.

⁸ Gellius, XIII. 15; Cicero de lege arg. advers. Rull. II. 11. 12, de legib. III. 13, ad Attic. IV. 18, ad fam. I. 9, ad Quint. frat. III. 2; Livy, V. 46. 52; IX. 38;

ity.¹ At the end of the present period there appeared in it, in connection with the requisite priests, only the thirty lictors as representatives of their *curiæ*.² The *comitia centuriata* had continuous criminal jurisdiction over Roman citizens;³ they had the determination as to war and peace⁴ and the choosing of the higher ordinary magistrate,⁵ and also the acceptance of proposals for laws, which, by their adoption, became laws.⁶ Beside this *comitia*, the *comitia tributa* grew more important. This was generally held by the tribunes, in which the plebeians had the preponderance,⁷ and which, at the end of this period, became the case of the *comitia centuriata*.⁸ The tribune *comitia* had already, in the preceding period, the choosing of the plebeian magistracy⁹ and to decide their complaints.¹⁰ In this period the choosing of all of the inferior magistracy fell to them,¹¹ and it also came to pass that they could render proposals of laws effectual as laws (*plebiscita*) by their adoption of them.¹² The division into tribes, according to which these *comitia* voted, originated from the beginning of the government of *Servius Tullius*.¹³ From that time there were four city tribes (*tribus urbanæ*) and a fluctuating greater number of country tribes (*tribus rusticæ*), which at last was thirty-one.¹⁴ This division became, in the second period, the basis of the division of the *comitia* of the centuries; thus the several centuries became divisions of the several tribes.¹⁵ In both kinds of the *comitia*, in the seventh century, through the *leges tabellarie*, the voting by *viva voce* in public gradually everywhere was changed into voting by secret¹⁶ ballot, by depositing tablets (*per tabulas*).

Fest. v. cum imperio; Ascon. ad Cicero pro C. Corn.; Dio Cass. XLI. 43; fr. 1. § 1. D. 1. 21.

¹ Respecting the *curiæ*, see Ovid, *Fastor.* II. v. 528-531.

² Cicero *adv. Rull.* II. 12.

³ Cicero *pro Sextio*, c. 34, *de legib.* III. 19.

⁴ *Dionys.* VI. 66.

⁵ Cicero *de legib.* III. 3; Gellius, XIII. 15. § 4.

⁶ § 31, *infra*.

⁷ Earlier and even since the year 284 the patricians were wholly excluded: Livy, II. 60; III. 71. 72. Subsequently they were permitted to vote: Livy, XXVII. 21.

⁸ In consequence of the dying out of many of the patrician families and the new order of things hereafter mentioned.

⁹ Since the year 283; Livy, II. 56-58; *Dionys. Hal.* IX. 41-49.

¹⁰ *Dionys.* VII. 58; IX. 46; Gellius, IV. 14; X. 6; Joann. Lyd. I. 44.

¹¹ Gellius, N. A. XIII. 15.

¹² § 22, *infra*.

¹³ Livy, I. 43; *Dionys. Hal.* II. 15; IV. 14. 15; Pliny, *hist. nat.* XVIII. 6; Varro *apud non Marcell.* 1. 205.

¹⁴ See note 12 and Livy, VI. 5; VII. 15; VIII. 17; IX. 20; X. 9; Livy, *Epit.* XIX.

¹⁵ The principal passage is Livy, I. 43: "Nec mirari oportet, hunc ordinem, qui nunc est, post expletas quinque et triginta tribus, duplicatum earum numero, centuriis juniorum seniorumque ad institutam a servo Tullio summam non convenire."

See also *Dionys.* IV. 21; Cicero *de legib.* III. 4, *pro Plancio*, c. 20, *pro Flacco*, c. 7, *de lege agr. adv. Rull.* II. 2; Livy, XXVI. 7; XXVI. 22.

¹⁶ See especially, Cicero *de legib.* III. 15-17.

Continuation. II. Senate.

§ 28. The naming of the senators, together with the undertaking of the census, with which it at present was connected, passed from the consuls to the censors. Though since the expulsion of the kings, with the patrician senators (*patres*) there were also named a number of plebeian senators (*conscripti*)¹—to this the plebeians were not properly entitled—it soon came to pass in this period² that in the selection only personal services should be regarded, and not the distinction between patricians and plebeians.³ However, at a later period the selection was also governed by the census.⁴ The selection properly was only for five years, till the next census;⁵ but, at a later period, it was substantially for life, inasmuch as he who was once chosen could not be passed over in a new selection without proper cause.⁶ Besides the senators actually selected, they who had retired from the curulean offices since the last census⁷ and the tribunes⁸ had seats and voices in the senate.⁹ The sphere of business of the senate, which, in connection with the consuls, was in the beginning greater than when in connection with the kings, was during this period on the one hand diminished by the independence which the *comitia* acquired, while on the other hand it was enlarged, partly by the existing laws respecting the government of the several provinces, leaving to it especially the selection of the state holder and the designation of the means at his command (the *ordinare et ornare provincias*),¹⁰ and partly that it alone, without the co-operation of the *comitia*, enacted resolutions which had the force of laws.¹¹

Continuation. III. Officers.

§ 29. The enlargement of the state's dominion had, as a consequence, the increase of the proper officials of the state and of the city. The consuls received several assistants, who, like themselves, had the *imperium*, and were higher magistrates. There arose, also, new minor officials,¹² who belonged to

¹ Livy, II. 1; Dionys. Hal. V. 13; Festus v. Qui patres.

² By the Lex Ovinia of the fourth century U. C., which, according to Drakenborch ad Livy, XXXIX., was certainly after the year 318.

³ Festus v. Præteriti senatores.

⁴ Livy, XLII. 61; Cicero ad famil. XIII. 5; Ovid Trist. IV. 10. v. 35; Sueton. Octav. c. 41; Pliny, hist. nat. XIV. præm.

⁵ Festus, *supra*; Livy, XXVII. 11; XXXIV. 44; XXXVIII. 28.

⁶ Zonaras, VII. 19; Livy, XXXIX. 42.

⁷ Gellius N. A. III. 18; Festus v. Senatores. This applies to the exquæstors only since Sulla. Vellei. Paterc. I. 111; fr. un. § 3. D. 1. 13.

⁸ Zonaras, VII. 15; Gellius, XIV. 7. 8.

⁹ Hence the formulary: *senatores quibusque in senatu sententiam dicere licet*. The actual magistrates of the people (*magistratus populi*) had seats, but not votes if they were not senators.

¹⁰ Cicero ad famil. XII. 21, pro domo, c. 9; Livy, XLV. 17; Plutarch, Marc. c. 23.

¹¹ See § 33, *infra*.

¹² On the distinction between *magistratus majores* and *minores* see Gellius N. A. XIII. 15; Cicero de legib. III. 5.

the *magistratus populi*, and who, like the higher officials, were originally selected only from the patricians, but which, in all cases, was soon changed.¹ Since the year 311 U. C., two censors were chosen every five years² to administer the chamberlainship of the state instead of the consuls, especially the census, the making of contracts for supplies, the leasing of lands and of the revenues, and the stipulations for labor.³ With the holding of the census there was connected the selection of the senators and knights,⁴ and the placing of the several citizens into distinct classes, tribes, etc. In this regard was always had to conduct: sometimes a note of censure (*nota censoria*) was made in the list of citizens; thus the censors might be designated as judges of morals.⁵ However, according to the *lex Æmilia*, A. U. C. 321, the official term of the censors was generally only a year and one-half, and the necessary business of the censors after this, till the new census, was transacted by the consuls.⁶ Among the consular functions, which formerly was also that of the kings, was the administration of the civil jurisdiction;⁷ but since 387 A. U. C., in addition to the consuls, there was chosen for this an especial magistrate in Rome, who was termed *prætor urbanus*.⁸ He, however, only had jurisdiction when the contesting parties were Romans (*inter cives jus dicebat*). In consequence of the great increase of non-Romans in Rome, a second prætor was appointed (first A. U. C. 508), whose duty was to decide the legal transactions between non-Romans among themselves, and between Romans and non-Romans (*inter cives et peregrinos jus dicebat*), and who was termed *prætor peregrinus*.⁹

As a number of countries became Roman provinces, four new prætors were chosen as civil and military governors thereof.¹⁰ But, as in the seventh century, for a number of the most important crimes permanent criminal commissions were introduced (*questiones perpetuæ*), the new prætors became presi-

¹ Of the extraordinary officials, at last the *interrex* was the only exception. Cicero pro domo. c. 14. The plebeians were permitted to be—

1st. *Questores* in A. U. C. 346. Livy, IV. 54; fr. 1. § 3. D. 1. 13.

2d. *Consuls* in the year 387. Livy, VI. 39–42.

3d. *Dictators* in the year 399. Livy, XII. 17.

4th. *Censors* in the year 415. Livy, VIII. 12.

5th. *Prætors* in the year 417. Livy, VIII. 15.

6th. Priestly honors in the year 454. Livy, X. 6. They could become *Decemviri Sacrorum* since the year 387. Livy, VI. 37. 42.

² Livy, III. 22; IV. 8.

³ Polybius, VI. 13. 17; Cicero de legib. III. 3. de lege agr. adv. Rull. I. 3. in Verr. II. 3. c. 6. pro lege Manil. c. 6. 7; Livy, IV. 8; XXIX. 15. 37; XXXIX. 44; XL. 51; Pliny, hist. nat. X. 22.

⁴ Livy, VIII. 17; Fest. v. *Præteritii* senatores.

⁵ Cicero pro Cluentio c. 42–45. de orat. II. 64; Livy, IV. 8; Gellius, 12. 20.

⁶ Livy, IV. 24; IX. 33; fr. 2. § 17. D. 1. 2.

⁷ fr. 2. § 16. D. 1. 2; Livy, I. 26; II. 1.

⁸ Livy, VI. 42; VII. 1; VIII. 15; Heineccius, ant. Rom. 1. 2. § 18–22.

⁹ fr. 2. § 28. D. 1. 2; Theophilus ad § 7, I. 1. 2.

¹⁰ Livy, Epit. XX.; fr. 2. § 32. D. 1. 2; Livy, XXXII. 27.

dents of them in Rome, and first went, in the following year, as pro-prætors in the provinces. And thus, soon the retired consuls were sent as pro-consuls, and both of the retired old prætors were sent as pro-prætors, into individual provinces.¹ Two curulean ædiles were, like the *prætor urbanus*, chosen annually since 387 A. U. C. They had, at least later, with the *ædiles plebis*, who continually were of lesser dignity, the administration of nearly the entire police of Rome,² and therewith was connected some civil jurisdiction.³ To the ancient *quæstors*, the administrators of the principal national treasury, succeeded new ones, namely, in 335 A. U. C., two as army paymasters,⁴ and in the year 487, one for the receipts from conquered Italy;⁵ finally, as the provinces were created, each state-holder regularly took a quæstor with him, who had the same jurisdiction as the ædiles had in Rome.⁶ Further, there were, as other minor officials, the *twenty-six men* (*viginti sex viri*), who were chosen together for the exercise of several functions under different names.⁷ The extraordinary representatives of the consuls, as formerly, when these were wholly wanting, was an *interrex*;⁸ and when the consuls and their ordinary representatives, the prætors, were absent from Rome, the representative was a *præfectus urbis s. urbi*,⁹ and when the senate deemed the usual official power insufficient it was a dictator,¹⁰ who had to choose a *magister equitum* for himself. And in the fourth century, during the contest for the admission of the plebeians to the consulate, during a series of years, instead of two consuls, a number of military tribunes, with the power of consuls (*tribuni militum consulari potestate*), were chosen.¹¹

Law Sources of this Period.

§ 30. The law sources subsequent to the Twelve Tables, from which the law contained in them, as well as the then prevailing unwritten law, was sup-

¹ Livy, XLV. 16.

² Livy, VII. 1; fr. 2. § 26. D. 1. 2; *Heineccius*, I. 2. § 25-27, and see also notes to § 22, *supra*.

³ fr. 2. § 34. D. 1. 2; fr. 1. § 1. fr. 63. D. 21. 1.

⁴ Livy, IV. 43, 44; Cicero in Verr. II. 1. c. 15.

⁵ Livy, Ep. XV.; Tac. Annal. XI. 22.

⁶ fr. 1. § 2. D. 1. 13; Gaius, I. § 6.

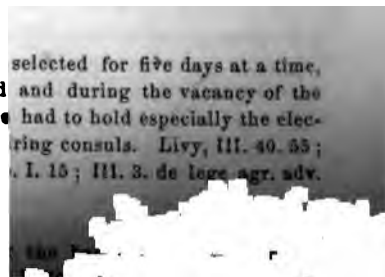
⁷ Dio Cass. LIV. 26; Fest. v. *præfecturæ*.

⁸ These already in the most ancient time were selected for five days at a time, out of the first senators, when the king was dead and during the vacancy of the throne. Livy, I. 17. At a subsequent period he had to hold especially the election assemblies when this was not done by the king. Livy, III. 40. 33; I. 15; III. 3. de leg. agr. adv. Rull. III. 2.

⁹ fr. 2. § 33. D. 1. 2.

¹⁰ Such a one arose Cicero de republ. six months, and, the consuls.

¹¹ Livy, IV



plied and further developed, may be classed under two heads, viz., express law (*jus scriptum*—written law), and the law of custom (*jus non scriptum*—unwritten law). It should be here observed, that the gradual improvement of the Roman law was effected, not so much by the enactments of the legislative power as by the beneficial influence of the law-declaring authorities, viz., the proper judges and the juriconsults.¹

I. Legislation.

1. *Leges*.²

§ 31. The express legislation included the decrees of the people in their strict sense or *leges*, that is, such laws as were proposed by a magistrate presiding in the senate, and adopted by the Roman people (*populus Romanus*) in the *comitiis centuriatis*. They related more particularly to public than to private law.³

2. *Plebiscita*.

§ 32. The *Plebiscita* were resolutions passed in the *comitiis tributis* (assembly of the tribes) on the motion of one of the plebeian tribunes.⁴ Their name was derived from the fact that, at a former period, the plebeians alone voted on them, and at a later period they had the preponderance (§ 27, *supra*). Originally they were only binding on the plebeians, till the consuls Horatius and Valerius (A. U. C. 305) passed a law, *ut quod tributim plebs jussisset, populum teneret* (that the decrees passed in the meetings of the plebeians should be the laws for the whole people), which afterwards (A. U. C. 415) was renewed and confirmed on the motion of the consul Publilius, *ut plebiscita omnes Quirites tenerent* (that all the Romans should be bound by the decrees of the plebeians), and which was, on the motion of the dictator Hortensius (A. U. C. 467), renewed and confirmed.⁵ The *plebiscita* related more to the private law than the *leges* did.⁶

¹ Savigny, *Gesch. des R. R. im Mittelalter*, Vol. I. p. 2.

² Heineccius, *antiqu. Rom. lib. tit. 2. § 1-14*.

³ *Gaius*, I. 3: § 4. I. 1. 2. One of the *leges* Publiliæ, of the year U. C. 416 (see § 32, *infra*), prescribed "ut legum quæ comitiis centuriatis, ferrentur, ante initum suffragium Patres auctores fierent." Livy, VIII. 12. The views on this law differ. See, Niebuhr, Vol. 2, p. 349, *seq.*; D. 1. 1. 2. The latest writers differ as to text, and their relation to each other. See, Niebuhr, Vol. 2, p. 349, *seq.*; Walter, *Rechtsgesch.* § 66, 67. The names from the persons who proposed the laws, as Lex Cincia, etc.

⁴ § 4. I. 1. 2; *Gaius*, I. 3; *Heineccius*, *antiqu. Rom. lib. tit. 2. § 1-14*.

⁵ Livy, III. 35; VIII. 12; § 4.

⁶ Noct. Att. XV. 27. Theophilus.

to the meaning of the three laws.

other. See, Niebuhr, Vol. 2, p. 349, *seq.*

names from the persons who proposed the laws, as Lex Cincia, etc.

§ 17.

D. 1. 2; *Gaius*, I. 3. See *Gellius*,

D. 1. 1. 2. The latest writers differ as

to text, and their relation to each

other; *Rechtsgesch.* § 66, 67. The

names from the persons who proposed the laws, as Lex Cincia, etc.

3. *Senatusconsulta*.

§ 33. The *senatusconsulta* were decrees of the senate without the concurrence of the people.¹ Like the *leges* they generally had reference to the public law; however, there are already in this period instances of decrees of the senate concerning matters of private law.² At first the plebeians would not submit to the decrees of the senate; but as the senate submitted to the *plebiscita*, the plebeians then acknowledged the *senatusconsulta* as binding on them;³ the tribunes, however, reserved the right to protest against the decrees.

II. *The Law of Custom*.

§ 34. The law of custom was formed in various ways, and was of much greater importance to the private law than the sources before mentioned. Several kinds of this law were—the *mores majorum*, or law which was founded on the manners and customs of their ancestors and transmitted to their descendants;⁴ the *consuetudo*, or the law which in all times originated from the opinions and usages of the people; and the *res judicatæ* or *auctoritas rerum perpetuo similiter judicatarum* (the fixed authority of the determination of a similar question), that law of custom which was formed by uniform judicial decisions in similar cases, and which at the present day the Germans term *practice* or *judicial usage* (*usus fori*); and which the French term *la jurisprudence des arrêts*.⁵ However, the most important influence on the establishment of the law of custom as well as on the adaptation of the law in general to the times, was exercised during this period by the prætors and other higher magistrates, as also by the jurists, the former by their edicts and the latter by their commentary on the law and practically applying it.⁶

The edicts, juridical opinions and writings will be more fully treated of in §§ 38, 39, *infra*.

III. *Edicts of Magistrates*.1. *Prætors' Edicts*.⁷

§ 35. The prætors soon acquired a decided influence on the development of the private law. The proper Roman law (*jus civile*) formerly was only

¹ Gaius, I. 4; § 5. I. 1. 2; fr. 2. § 9. 12. D. 1. 2; *Heineccius*, antiq. Rom. lib. 1. tit. 2. § 46–54.

² Livy, lib. 39. cap. 3. lib. 41. cap. 9; *Hugo*, Rechtsgesch. p. 406–414.

³ Theophilus, paraphr. ad § 5. I. 1. 2; also see *Burchardi*, Lehrb. Vol. 1, § 58; *Puchta*, Instit. § 75.

⁴ fr. 1. D. 24. 1; fr. 2. pr. D. 28. 6. See, Cicero, Top. c. 5.

⁵ fr. 38. D. 1. 3.

⁶ The Romans in this period already included the magisterial edicts in the sources of the written law; *jus, quod ex scripto constat*. See § 126, *infra*.

⁷ *Heineccius*, l. c. § 23. 24; *Haubold*, inst. hist. dogm. § 170. *seq.*; *Hugo*, Rechtsg. p. 414, *seq.*; *Savigny*, Gesch. des R. R. im Mittelalter, Vol. 1, p. 3; *Roszhirt*, über die Tendenz des prætor. Edicts, Erlangen, 1812; *Francke*, de edicto prætoris urbani, Kil. 1830.

applicable to Roman citizens. But when the Romans extended their dominion over all Italy and many countries beyond it, their frequent intercourse with non-Romans caused them to institute in addition to their old national law (*jus civile*), distinguished by its strict principles and characteristic forms, a law adapted to the litigation of non-Romans in Rome. This was extracted in part from the proper Roman law and in part from other positive laws and in part was new law. It was termed *jus gentium*, because it was intended for persons of various nations (*gentes*). At a later period it was characterized as the summary of the legal axioms acknowledged by all civilized nations.¹ The Roman citizens were not unaffected by these general peregrine laws; for, independent of the relations of these laws to peregrines as individuals, they had a most important influence on the development of the proper Roman law. This was now chiefly effected by means of the edicts of the prætors.² The official authority of the Roman magistrates in general and of the declarers of the law in particular was not so closely limited but that much was left to their discretion, in consequence of which abuses might lead to the intercession of the tribunes and of similar and higher magistrates of the people and to complaints after the ending of the official year. As it was apparent that many matters should be submitted to the discretion of the law-declaring authorities, it was necessary, or at least beneficial, that the people should previously know which rules such authorities would observe in their decisions, hence official announcements (edicts), as were also frequently made in the administration of other branches of the government, became usual. It was a rule that those authorities at the beginning of their official year publicly announced a series of legal principles by which they would be governed in the discharge of their duties, "*ut scirent cives, quod jus de quaque re quisque dicturus esset, seque præmunirent.*"³ This had at the same time the advantage of fixing a barrier to the magistrate's bias and even avoiding its semblance. The edict of the prætor peregrinus appears to have been very comprehensive from the beginning, and from it arose the *jus gentium*.

The edict of the prætor urbanus, though it originated earlier, first acquired its great importance after the *lex Æbutia* introduced a new method of institution of suits, by which he was enabled to give actions which were not founded on the civil law, and to protect defendants by *exceptiones* against actions instituted, etc. When this and other legal remedies introduced by the prætor urbanus should be given, which was in part possible already

¹ § 1. I. 1. 2; fr. 9. D. 1. 1. See § 125, *infra*.

² Theophill, paraphr. ad § 7. I. 1. 2. See also the writings cited in note 7, p. 18.

³ fr. 2. § 10. D. 1. 2: That the prætors, etc., had a right to issue such edicts is shown very clearly by Gaius, I. 6; Cicero, ad Attic. 6. 1. de invent. 2. 22; *Autor ad Herennium*, 2. 13. Heineccius, in hist. jur. lib. 1. § 68-70, and in antiquit. jur. Rom. lib. 1. tit. 2. § 24, is therefore mistaken when he alleges that they had usurped the legislative power, and had overthrown the civil law by various "*artes*." See contrary, Bitter ad Heinecc. § 70, and especially Hugo, *Rechtsg.* *supra*.

before the *lex Æbutia*, his edict determines, and this determination forms the chief part thereof. The object of the edict was, partly to secure the enforcement of several principles of the civil law, partly to supply gaps in the same, and partly to answer the demands of a progressive age on jurisprudence with which the strict civil law was in actual conflict.¹ He everywhere sought as much as possible to enforce that which he with his contemporaries regarded as equity;² and thus through his edict many principles of the *jus gentium* also prevailed among the Romans.

Continuation.

§ 36. That edict which the prætor immediately on assuming his office published as the rule by which he would be guided during his term of office in all cases that might occur was termed simply *edictum* or *edictum annuum* or *edictum juris dictionis perpetuæ causa propositum*, and hence also *edictum perpetuum*.³ The edict of both of the prætors of Rome was termed simply *Prætoris edictum*, and that of the proconsuls and proprætors in the provinces was termed *edictum provinciale*. However, every prætor did not publish a wholly new edict (*edictum novum*), but generally retained the whole or a part of the edict of his predecessor (*edictum tralatitium*) as far as it had been approved by experience, and made only such additions and alterations as appeared to him to be required by and suitable to the times.⁴

2. Edicts of other Magistrates.

§ 37. As the administration of justice was intrusted to the prætors, so the care of the police was committed to the *ædiles*.⁵ The *ædiles curules*, like the

¹ Hence, Papinian says, in fr. 7. § 1. D. 1. 1, the prætors had introduced their law "adjuvandi, vel supplendi, vel corrigendi juris civilis gratia propter utilitatem publicam."

² *Æquitas* in this sense is not only simple equity, but much more, that which the spirit of the *jus gentium* demands in opposition to *jus strictum s. civile*, e. g., in fr. 2. § 5. D. 39. 3, "hæc æquitas suggerit, et si jure deficiamus." See especially, *Welcker*, jurist. Encycl. p. 137, note 22; *Schilling*, Pr. de æquitas, Leipsic, 1835.

³ It was not under Hadrian, as has been supposed, that the prætorian edict first received the name of *edictum perpetuum*. *Edictum perpetuum* is naught more than *edictum annuum*. *Asconius Pedianus*, ad Cic. orat. pro Corn. maj. reo; *Hugo*, Rechtsg. pp. 416, 417.

⁴ The *edicta prout res incidit*, which are usually opposed to the *edicto perpetuo* (because of fr. 7. pr. D. 2. 1), do not refer to them, but were simply rules of practice made by the prætor in certain suits; thus, e. g., the *edicta peremptoria* in fr. 68-70. D. 5. 1; Const. 8. C. 7. 43; *Schweppe*, Rechtsg. § 552. However, there may be edicts published during the official year for a special occasion and yet contain a general rule for the jurisdiction of those subject to the edict. Such an edict was that of Verres, to which the words relate in Cicero in Verr. III. 14, "exoritur peculiare edictum repentinum." An edict of this kind, which but seldom occurred, is not to be thought of in connection with the expression "prout res incidit."

⁵ On their origin, see §§ 22 and 29, *supra*.

prætors, had the right on entering into their office to publish an edict,¹ which indeed chiefly consisted of prescripts and regulations in matters relating to the police and markets, but which were also not wholly unimportant for the private law.² In the provinces the edicts of proconsuls and proprætors were termed *edicta provincialia*, and they had great influence on the private law which was applicable,³ but they had not an immediate effect on the proper Roman law.⁴ The quæstors, who had nearly the same jurisdiction that the ædiles had in Rome, do not appear to have issued especial edicts, but adopted those of the curulean ædiles.⁵ The law instituted by the magistrates' edicts is termed *jus honorarium*,⁶ and the largest and most important part thereof is termed the *jus prætorium*.

Opinions and Writings of Jurisconsults.

1. *Responsa prudentum.*

§ 38. The jurisconsults (*Prudentes, Jureconsulti*) acquired an equally important influence on the further formation of the law.⁷ After the main legal principles had been established by the twelve tables, the lawyers began to develop them more fully by interpretation,⁸ so as to render them better adapted to practice, and they settled the forms to be observed in the application of those principles.⁹ He who was not a lawyer was obliged to apply to such for advice and assistance when he required legal services. On such application he either gave his opinion (*responsum*) and prosecuted or defended the party when necessary before the court (*disputatio fori*),¹⁰ or directed him how to

¹ § 7. I. 1. 2; Theophilus ad § 8. I. 1. 2.

² Thus, the *actio redhibitoria* and *quantum minoris*, which yet exist, are founded on the edict of the ædiles. Dig. 21. 1. See fr. 27. § 28. D. 9. 2.

³ *E. g.*, Cicero ad Atticum VI. 1. ad familiar. III. 8. in Verr. I. 43. 46. II. 13.

⁴ This is the reason why Gaius I. § 6. does not present them as law sources.

⁵ Gaius, *supra*.

⁶ Doubtless termed "*ab honore Prætoris*," i. e., from the magisterial office from which such law emanated, therefore magisterial law, law from the magistrates. § 7. I. 1. 2; fr. 2. § 10. D. 1. 2; fr. 7. § 1. D. 1. 1. cannot well be otherwise understood. Wüsteman, Theophilus, Part 1, p. 32; Hugo, Rechtsg. p. 417; Rochay de la Renay, de juris honorarii. Leyden, 1827.

⁷ Heineccius, antiquit. lib. 1. tit. 2. 29-37; Schweppe, Rechtsg. § 75, seq.

⁸ On the extended sense of the word *interpretatio* with the Romans, see Puchta, Instit. § 78. At a later period the prætorian edict required a similar development.

⁹ So far as affects the forms which were used in the institution of an action, the text only refers to the old *legis actiones*, not also to the *formulae* in their strict sense, which since the *lex Æbutia* and other laws have regularly taken the place of the *legis actiones*. These *formulae*, as such, were established by the law magistrates, partly in general and partly for the special case with the co-operation of the parties.

¹⁰ fr. 2. § 5. D. 1. 2. It is doubtful what the *disputatio fori* meant, of which Pomponius here speaks, and of which we have no other information. On the different views of the ancient and modern jurists, see, Heineccius, l. c. I. 2. 35; Bach, hist.

institute his action or conduct a legal cause. By this as well as by the scientific¹ comments on the law in general, many legal maxims and principles were gradually formed. The law thus introduced by the jurists was called *auctoritas prudentum*, *sententiæ receptæ*, and also *jus civile* in its strict sense.²

2. Juridical Writings.

§ 39. There are, however, but very few traces of a strictly scientific treatment of the law in this period. At first only the patricians and pontiffs had an intimate knowledge of the existing law,³ and especially of the forms of actions and of procedure (*legis actiones*),⁴ and also of the juridical days (*dies fasti et nefasti*).⁵ They are said to have kept all these secret for a long time in order to make the plebeians dependent on them,⁶ till a certain Cneius Flavius, a clerk to the jurist Appius Claudius, published (A. U. C. 449) the book in

jur. lib. 2. c. 2. sect. 5. § 1; Moser, über die *disputatio fori*, in his Versuchen über einzelne Theile des Rechts, No. 1; Hugo, Rechtsg. p. 442; Puchta, Instit. § 76, especially note 1.

¹ The word *scientific* is not generally to be taken here in its limited sense. See § 39, *infra*.

² *Jus civile* had with the Romans, according to its context, very different significations. 1. In its extended sense it signified the positive law of a state generally (*jus civitatis proprium, quod quisque populus ipse sibi constituit*); thus in fr. 6 and 9. D. 1. 1. and in § 1. I. 1. 2. 2. It signified, by way of distinction, the positive law of the Roman state as contradistinguished from the *jus gentium*; thus in § 2. I. 1. 2; also Cicero, Top. c. 5. 3. In a narrower sense it signified simply the Roman law which is not *jus honorarium*, therefore the *leges plebiscita, senatusconsulta, auctoritas prudentum*, and subsequently also the *constitutiones principum*, fr. 7. D. 1. 1. 4. In its narrowest sense it signified simply the *auctoritas prudentum* and the *disputatio fori*, fr. 2. § 5. 12. D. 1. 2.

³ This, however, is only to be so understood as being a publicly exposed general law and a public administration thereof. The *jus sacrum* was not published, and plebeians were not jurists in the sense of § 38, *supra*, so long as they could not be magistrates, priests, or judges.

⁴ fr. 2. § 6. D. 1. 2; fr. 77. fr. 123. pr. D. 50. 17, and especially Gaius, IV. 11–30. See Höpfner, on the *legis actionibus* and *actibus legitimis*, 3d Appendix to his Commentary on the Institutes; Ram, de legis actionum origine et progressu, Utrecht, 1804; and especially Dirksen, Beitr. zur Kunde des R. Rechts, Leipzig, 1825, p. 221. The ancient literature is in Haubold, inst. jur. Rom. hist. dogm. ed. Otto, § 228.

⁵ In the Roman calendar those days were distinctly marked on which the courts were open (*dies fasti*) and when they were entirely closed (*dies nefasti*), or on which juridical business could be transacted for only part of the day (*dies interdicti*). Therefore Ovid says in his Fasti, I. 47:

"Ille nefastus erit per quem tria verba silentur
Fastus erit per quem lege licebit agi."

The *tria verba* are "Do, dico, addico," by which the extent of the official power of the prætors was indicated. Varro, de lingua latina, lib. 5. cap. 4; Elvers, de clarissimis monument. § 3.

⁶ fr. 2. § 6. D. 1. 2. See fr. 2. § 35, *ibid.*; Cicero de leg. lib. 2. c. 19. pro Murena, c. 11; Puchta, Instit. § 77; Cicero ad Attic. 6. 1.

which Claudius had composed and arranged the *legis actiones*.¹ From him the book was termed the *Jus Flavianum*.² This same Flavius published the *dies fasti*, which he had learned by repeated inquiries from Appius Claudius.³ When the plebeians became eligible as senators,⁴ magistrates and pontiffs, many of them devoted themselves to the study of the law. Tiberius Coruncanius, the first plebeian who became *pontifex maximus* (A. U. C. 500), is said to have been the first who taught law publicly.⁵ In the course of time, as the law had become more and more developed and new forms were required for new actions, a certain Sextus Ælius Catus composed a book of such forms, *alias actiones composuit* (A. U. C. 552), and in the same year published it. This book was named after him, *Jus Ælianum*.⁶ This probably is not the same work⁷ of this jurist which Pomponius terms the cradle of the *jus civile*, namely, his *Tripertita*, wherein he adds an interpretation of the text of the twelve tables, and appends the *legis actiones*. In addition to the foregoing there were also the following jurists of this period: M. Porcius Cato, surnamed Censorius,⁸ and Marcus Portius Cato, the son of the above-named,⁹ and the three jurists of whom Pomponius says that they laid the foundation of the *jus civile* (*qui fundaverunt jus civile*), and wrote many books thereon; Publius Mucius Scævola, Marcus Junius Brutus and Manilius,¹⁰ to the latter of whom the *actiones Manilianæ*, or the forms of contracts of sale, are attributed;¹¹ likewise Publius¹² Crassus, brother of Publius Mucius Scævola;¹³ Q. Mucius Scævola, surnamed Augur,¹⁴ and Hostilius, who composed the *actiones Hostilianæ*, which probably were forms of testaments.¹⁵

¹ fr. 2. § 7. D. 1. 2; Livy, lib. 9. cap. 46. According to Cicero, *supra*, the jurists were said to have been much vexed at this publication, but Flavius became so popular that he was rewarded by being made tribune, senator and curulean ædile. Pomponius, fr. 2. § 7. D. 1. 2; Niebuhr, Vol. 3, p. 316, Eng. ed.

² See Hugo, *Rechtsg.* p. 449, *seq.*; Schilling, *Bemerk. über Röm. Rechtsg.* p. 124-129.

³ Pliny, *hist. nat. lib.* 33. cap. 1.

⁴ As senators they were then named as *judices privati*. See § 202, *infra*.

⁵ fr. 2. § 35. D. 1. 2.

⁶ fr. 2. § 7. in fin. D. 1. 2.

⁷ fr. 2. § 38. D. 1. 2.

⁸ fr. 2. § 38. D. 1. 2; Livy, lib. 39. c. 40; Cicero *de orat. lib.* 1. c. 37. lib. 2. c. 33; *Festus v. Mundus*.

⁹ fr. 2. § 38. D. 1. 2; *Brillenburger de jurisprudentia*. Leyden, 1826.

¹⁰ fr. 2. § 39. D. 1. 2; *Haubold*, l. c. § 193.

¹¹ Varro *de re rust. lib.* 2. c. 5.

¹² It is true that Pomponius terms him Lucius, but see *Zimmern*, *Rechtsg.* § 75.

¹³ In his old age he was Cicero's teacher, who terms him "*Jurisconsultorum disertissimum*;" fr. 2. § 40. D. 1; Cicero, *Lael. c.* 1. *pro Balb. c.* 20; *Valer. Max. lib.* 6. c. 12.

¹⁴ Pomponius does not mention him, as fr. 2. § 41. D. 1. 2, relates to the distinguished Q. Mucius, who is first spoken of in the succeeding period in § 52, *infra*. See generally respecting him, *Zimmern*, end of § 75.

¹⁵ Cicero *de orat. lib.* 1. c. 57.

THIRD PERIOD.

FROM CICERO TO ALEXANDER SEVERUS.

(A. U. C. 650-1000, or from 100 before to 250 after Christ.)

*Change in the Political Condition of Rome.*I. *The Seat of Political Power.*

§ 40. In the beginning of this period the Roman state in name and appearance was still nominally a republic, but in fact it was governed by single rulers with monarchical powers.¹ After Cæsar Octavianus, who was surnamed Augustus, had conquered Antonius in the battle of Actium (B. C. 31), he became as *Princeps Reipublicæ* the ruler of the state by uniting in his person the most important of the old republican magistracies. He, indeed, partly observed the old republican forms, but under his successors even these forms gradually disappeared; the power of the *principes* (sovereigns) became more absolute, and finally it degenerated into the most oppressive despotism.²

*Continuation.*A. *The Princeps.*

§ 41. The governmental offices which the *Princeps* united in his person for life were³—

1. The *tribunitia potestas*. This conferred on his person the necessary sanctity for a monarch, and gave him the right to hold legislative assemblies (*comitia*) and a senate, and to protest against every step taken by a republican magistracy, as also against every resolution by the *comitia* and senate. There were also joined with his right of interfering⁴ the provocations or appeals, instituted by Augustus, to the emperor or his representatives, as superior judges, against judicial judgment.

2. The *proconsulare imperium*. He was governor-general of all the provinces, except those which he left to the senate to govern in the old way, so that now a distinction was made between *provinciæ Cæsaris* and *provinciæ Populi s. senatus*.⁵ The former he suffered to be governed by his deputy governors, who originally, like other deputy governors, were termed *legati*, namely, *legati Cæsaris*, but afterwards were termed *præsides*,⁶ and to whom he added, for the financial affairs, *rationales* or *procuratores Cæsaris*.⁷ And to the provinces of the senate, whose governors were now usually termed *proconsules*,⁸ and

¹ As to the manner of its occurrence, see *Walter*, *Rechtsgesch.* Vol. 1, cap. 28; *Puchta*, *Instit.* § 70-72; *Mommsen*, *R. Gesch.*, Berlin, 1856, Vols. 2 and 3.

² *Tacitus*, *Annal.*, lib. 1, cap. 1, *seq.*

³ See chiefly, *Dio Cassius*, LIII. 16-19.

⁴ Also his *proconsulare imperium*.

⁵ *Sueton.* Octav. 47; *Dio Cassius*, LIII. 12-14; *Gaius*, I. § 6; II. § 21.

⁶ *D. de officio præsidis* (1. 18.). On Egyptians, see *D. de officio præfecti augustalis* (1. 17.), and *D. de officio juridici* (1. 20.).

⁷ *Dio Cassius*, LII. 25; LIII. 15; *Capitol. Ant. Pius.* c. 6.

⁸ *D. de officio proconsulis et legati* (1. 16.).

who, as formerly, had quaestors to assist them,¹ the emperor sent *procuratores* for the administering of the affairs of the treasury.²

3. He was *imperator perpetuus*. As such he had the levying of the soldiers, the command of them, the swearing them on the standards, the determining of war and peace, the imposition of taxes, and an unlimited power of punishment over persons of every kind in the whole Roman territory.

4. He had the *censorial power* and was *præfectus morum*, even when no appointment of censors took place, which power always rested with him and another, but at a later period was omitted. He also had especially the power of appointing and deposing senators.

5. He was *pontifex maximus* and member of all superior sacerdotal colleges.

6. He frequently filled the consulate, and, in addition to the *ærarium populi* (public treasury), there was not only an imperial private treasury under the name of *fiscus*, but also an especial *ærarium militare*,³ over which the emperor had the same unlimited power as he had over the *fiscus*.⁴ This *ærarium militare* ceased in the year 300 of this era, after the supervision of the *ærarium populi* passed from the senate to the emperor, and the distinction between the *fiscus* and the *ærarium* had nearly wholly lost its practical importance.⁵ The governmental affairs transferred to him, he in part undertook, assisted by a council,⁶ with which, according to the example of the republican magistrates, he was surrounded, and whose composition naturally depended on him; and those affairs he also in part suffered to be transacted by his representatives whom he appointed, and who should not be confounded with the republican magistrates hereafter spoken of. Of these imperial servants, besides those already mentioned, are the *præfectus urbi*⁷ (P. U.), *præfecti prætorio*⁸ (P. P.), the *præfectus vigilum*,⁹ the *præfectus annonæ*,¹⁰ and finally the imperial treasury officers, namely, the *procuratores Cæsaris s. rationales*¹¹ and the *præfecti æarii militaris*.¹²

B. The Senate and the Ancient Republican Magistrates.

§ 42. During this entire period the Roman people had, theoretically, the highest political power, but in fact the *comitia* gradually dwindled out of

¹ *Geius*, l. c.

² *Dio Cassius*, LIII. 15; fr. 9. pr. D. 1. 16. See fr. 1-3 eod.

³ *Sueton.* Octav. 49; *Dio Cassius*, LV. 24. 25; LVI. 28.

⁴ On these three treasuries, see especially, *Waller*, *Rechtsges.* I. cap. 37, especially § 329-333.

⁵ *Waller*, *Rechtsges.* § 334.

⁶ This occurred since Augustus, and especially since Hadrian respectable jurists were always appointed thereto: *Dio Cassius*, XLIII. 21; LX. 4; *Sueton.* Octav. 35. Tib. 3; *Spartian.* Hadr. 8. 17. 21; *Lamprid.* Alex. 14. 16.

⁷ *D. de officio præfecti urbi* (1. 12.); *Tacitus*, *Annal.* VI. 11. 12.

⁸ *D. de officio præfecti prætorio* (1. 11.); *Tacitus*, *Annal.* IV. 1. 2.

⁹ *D. de officio præfecti vigilum* (1. 15.), *Sueton.* Octav. 30.

¹⁰ *Sueton.* Octav. 37; *Tacit.* *Annal.* 1. 7. XI. 31.

¹¹ *Waller*, *Rechtsges.* § 333.

¹² *Dio Cassius*, LV. 25.

existence. The emperor decided as to war and peace. The choosing of the magistrates passed over to the senate under Tiberius,¹ new *leges* now appeared only for a brief period (§ 44, *infra*), and the assent to the transfer of the imperial power (*lex de imperio*) (see note 2, page 29) was given by the simple acclamation of an assembled multitude without an organized comitia.

The senate² had not only the choosing of the republican magistrates, but also of the emperor, and the adoption of new laws, instead of the comitia so doing (see § 45, *infra*), and to decide respecting the continuance or abolition of the³ regulations of the late emperor.⁴ But in all these relations it was extremely dependent. Thus also in the choosing of a governor, who, however, without it continued for only a part of the provinces, and in the chief supervision of the *ærarium populi*, which at length it wholly lost. Its participation in the remaining state administration depended solely on the person of the reigning emperor. But in this period it already began to be a respected imperial criminal, judicial court. The ancient republican magistracy preserved itself chiefly throughout the whole of this period, but it only maintained such importance as comported with the new order of affairs. The consuls continually acquired a higher status, but had little power.⁵ While censors continued to be chosen the emperor was one of them,⁶ and the other comported himself in accordance with him.

Of the prætors, they who presided over the *questiones perpetuæ* (criminal commissions) ceased to exist not later than Septimius Severus and with the *questiones*.⁷ The prætor *urbanus*, on the other hand, remained, as also the prætor *peregrinus*, at least till the end of this period; there also arose especial prætors for particular branches of the civil jurisdiction, namely, a prætor *fidei commissarius*,⁸ a prætor *fiscalis*,⁹ and a prætor *tutelar*.¹⁰ However their office lost much of its importance, especially by the institution of appeals to a higher jurisdiction; respecting their edicts, see § 47, *seq.*, *infra*. The tribunes had important powers,¹¹ but they could only exercise them in accordance with the views of the reigning emperor. Among the state quæstors

¹ Tacitus, Annal. I. c. 15, "tum primum e campo comitia ad patres translata sunt;" Vellei., II. c. 126.

² Walter, Rechtsages. I. cap. 33.

³ The *memoriam damnare* was connected with the *acta rescindere*.

⁴ Sueton. Claud. 11, Domit. 23, Lamprid. Commod. 20.

⁵ D. officio consulis (1. 10.). On the *consules suffecti*, which usually appear during this period, see, Dio Cassius, XLIII. 46; LVIII. 20; LXXII. 12.

⁶ Sueton. Claud. 16; Dio Cass. LIII. 18; LIV. 2.

⁷ Mittermaier, das deutsche strafverfahren, Heidelberg, 1832, Pt. 1. p. 46.

⁸ Claudius instituted two; since Titus but one appears: Sueton. Claud. 23; fr. 2. § 32. D. 1. 2.

⁹ Under Nerva, fr. 2. § 32. D. 1. 2.

¹⁰ Under M. Antoninus, Capitol. Marc. 10. fr. 6. § 13. D. 27. 1.

¹¹ Hence their position by Pomponius in fr. 2. § 34. D. 1.

there were several (*quæstores candidati Principis*) through whom the emperor sent his messages to the senate;¹ besides, there were especial *præfecti ærarii*, who were chosen from former prætors.² Provincial quæstors continued to exist only in the senate provinces.³

II. Italy and the Provinces.

§ 43. The distinction between Rome, Italy, and the provinces was less, though it did not wholly cease. In the beginning of this period, in consequence of the confederated union war, the Italians acquired full Roman citizenship through the *leges de civitate sociorum*, namely, the *lex Julia*⁴ (a. 664. p. u. c.) and the *lex Plantia Papiria*⁵ (a. 665), so that now they had part in the comitia,⁶ and the proper Roman law applied to them. Soon afterwards (a. 709. p. u. c.) there was introduced a general Italian state ordinance, that named by Julius Cæsar *lex Julia municipalis*. Shortly afterwards⁷ (a. 711. p. u. c.) upper Italy, hitherto termed *Gallia cisalpina*, ceased to be one of the provinces, and after the *lex Rubria* had declared more precisely to what extent the law should be administered therein by the magistrates of the city of Rome and to what extent by the municipal authorities. Among the provincial cities, as formerly, many were privileged by receiving the *jus Latii*; that is, they were rendered equal to Latin colonies, and some of them received the *jus Italicum*. Since the time of Hadrian the whole of Italy, except Rome, was divided into five jurisdiction districts, only one of which was subjected to the magistrates in Rome; to the others especial magistrates were sent, who originally were termed *consulares*, but since Mark Aurelius were called *juridici*.⁸ The magistrates of the cities, however, continued to retain a limited part of the jurisdiction.

Finally Antoninus Caracalla extended Roman citizenship to all the then subjects, as also to the provincials,⁹ which, though it could not under the then existing circumstances afford them any important political rights, yet was of great importance because in consequence thereof the proper Roman law became equally valid in every part of the empire.¹⁰

¹ fr. un. § 2-4. D. 113.

² Sueton. Octav. 36, Claud. 24; Tacitus, Annal. XIII. 28.

³ Gaius, I. § 6.

⁴ Cicero pro Balbo, c. 8; Gellius, IV. 4.

⁵ Cicero pro Archia, c. 4, ad familiar. XIII. 30.

⁶ They came in eight tribes: Velleius, II. 20. Probably eight of the former thirty-five tribes, whose number does not appear to have been increased: Waller, § 258, note 12. See, generally, Appian. de bello civ. I. 49.

⁷ Appian. de bello civ. V. 3; Waller, § 260, end.

⁸ Waller, § 246, 318.

⁹ Spartian. Hadr. 22, Capitol. Pius, 2; Vatic. Fragm. § 232.

¹⁰ fr. 17. D. I. 5.

*Law Sources of this Period.**I. Decrees of the People.*

§ 44. The changes effected in the private law in this period were by :

1. The decrees of the people. 2. *Senatusconsulta*. 3. The *constitutiones principum*. 4. The *edicta prætorum*. 5. The *responsa prudentum*, and 6, by the commentators. The decrees of the people, which still continued to be either *leges* or *plebiscita* (§§ 31, 32, *supra*), were never made in greater numbers than during the civil wars which in the beginning of this period subverted the state.¹ There are among them many which were, and long continued to be, important to the private law,² wherefore, in later times, voluminous commentaries were written on them by the classical jurists (§ 51, *infra*). But the more the power of the supreme ruler was transformed into an absolute sovereignty, the fewer became the decrees of the people, and towards the end of this period they ceased to be mentioned.³

II. Senatusconsulta.

§ 45. The *senatusconsulta* (§ 33, *infra*), as the decrees of the people decreased, became a much more important source of law than they hitherto had been, and continued so till the end of this period.⁴ They now began to be named after either the consul who proposed them⁵ or the emperor himself, who made the proposition in writing (*per epistolam*) or orally (*ad orationem*),⁶ and sometimes after the person who had occasioned them.⁷

¹ "Corruptissima republica plurimæ leges," says Tacitus in his *Annals*, III. 27.

² The most important decree of the people for the private law in this period is undoubtedly the *Lex Julia et Papia Poppæa* of the time of Augustus. See thereon *Jac. Gothofredi*, *quatuor fontes juris civilis*, Geneva, 1653 (and in *Otto's Thesaurus* T. 3); *Heineccius*, *comm. ad l. Jul. et Pap. Popp.*, Amsterdam, 1726; *Hugo*, *Rechtsg.* p. 755; *Puchta*, *Instit.* § 107; *Walter*, § 346, II. § 640.

³ The latest reliable information of a new *lex* is of the time of Nerva: fr. 3. § 1. D. 47. 21. Respecting the age of the law which is mentioned in *Const. 3. C. 7. 9*, under the name of *lex Vectibulici*, naught is positively known except that it is certainly older than a *senatusconsult* under Hadrian (a. 129 p. Chr.), which has been discovered.

⁴ *Geertsema*, *Diss. de senatus Rom. auctoritate præsertim sub imperatoribus*, Groningen, 1824. In our sources there do not appear any examples of private law *senatusconsulta* subsequent to Caracalla; and that which is mentioned in fr. 1. § 2. D. 11. 4 belongs not to him: *Schilling*, *Bemerkungen*, p. 293.

⁵ *E. g.*, *Scutum Silianum*, under Augustus; *Scutum Velleianum*, under Claudius; *Scutum Trebellianum*, under Nero; *Scutum Pegasianum*, under Vespasian.

⁶ *E. g.*, several, *Seta Claudiana*, *Scutum Neroianum*. See also fr. 8. D. 2. 15; fr. 3. 24. 1; fr. 52. § 10. D. 17. 2; fr. 1. D. 20. 2, where several such oral propositions are mentioned.

⁷ *Scutum Macedonianum*, called so after a certain Macedo, who killed his father in order to satisfy his creditors: *Theophilus*, ad § 7. I. 4. 7; fr. 1. D. 14. 6. However this appears to have been the case only in some of the *senatusconsulta*: *Hugo*, *Rechtsg.* p. 738, 775.

III. *Constitutiones Principum.*

§ 46. The *Constitutiones principum*, which appear as a new source of law,¹ were regarded already in this period by the juriconsults as *legis vicem*, and they referred to the *lex de imperio* as authority whereby the *Princeps* would confer his power.² These constitutions are distinguishable into four kinds:

1. *Edicta* (edicts), which at a later period were also termed *edictales*, that is, ordinances made publicly known.

2. *Mandata* (mandates), that is, general instructions for individual officers, which were communicated only to them.

3. *Decreta* (decrees), that is, judgments rendered on litigated suits which either were instituted originally, or, what was more usual, went up to the *auditorium principis*³ by way of provocation or appeal.

4. *Rescripta* (rescripts), these were answers in individual cases which were chiefly given in response to inquiries by parties in relation to litigated suits, or to inquiries by the judges. The mandates generally did not enter into the private law, nor did the edicts in this period excepting rarely.⁴ On the other hand, there were very many rescripts and decrees which affected relations of the private law, and the judgments contained therein became rules for future litigated or doubtful legal questions.

IV. *Edicta Prætorum.*

§ 47. The prætors and ædiles of Rome, as also the proconsuls and pro prætors in the provinces, continued during this period to publish edicts on entering upon their offices. As, however, many of them probably took the liberty to deviate from them during their term of office, the people's tribune, Cornelius (A. U. C. 687), procured the passage of a law: *ut prætores ex edictis suis perpetuis jus dicerent* (that they should administer the law in accordance with their edicts).⁵ However, edicts after this still suffered some change, but not so much as formerly.

¹ Löhr, Uebersicht der Constitutionen, 2d Programme, p. 7; Hugo, Rechtsg. p. 740; Zimmern, Rechtsg. Vol. 1, § 44. 45.

² fr. 1. pr. D. 1. 4: "*Quod principi placuit, legis habet vigorem; utpote cum lege regia, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat;*" Gaius, I. 5: "*Constitutio principis est, quod imperator decreto vel edicto, vel epistola constituit, nec unquam dubitatum est, quin id legis vicem obtineat; cum ipse imperator per legem imperium accipiat;*" § 6. I. 1. 2. On the *Lex regia*, which is here mentioned, see Heineccius, antiq. lib. 1. tit. 2, § 62-67. where there is a fragment of this law; Haubold, inst. hist. dogm. § 57, note b; Hugo, Rechtsg. p. 720.

³ The *consilium principis* was thus named from the place of their assembling, fr. 23. pr. D. 36. 1.

⁴ Neither by Gaius, nor in Justinian's Institutes (see note 2, *supra*), nor in Ulpian's fr. 1. § 1. D. 1. 4, are the mandates specified among the kinds of the *constitutiones principum*. But see, e. g., fr. 19. pr. D. 1. 18; fr. 1. pr. D. 29. 1; fr. 2. § 1. D. 34. 9.

⁵ *De Cassius*, lib. 36. c. 23; *Ascon. Ped.*, ad Cicero pro Cornel mai reo; Heineccius, Antiq. Rom. § 23.

Comments on the Prætorian Edicts—Ofilius.

§ 48. The prætorian edict had for a long time formed the chief source of the private law; and it soon became a subject of literary comment. The first who wrote particularly on this subject was Cicero's life-long friend Servius Sulpicius Rufus (§ 52, *infra*). This work, however, only consisted of two small books, which evidently were soon supplanted by a larger fundamental work by his distinguished pupil, Aulus Ofilius (§ 52, *infra*), a friend of Cæsar. Pomponius,¹ in enumerating his works, says of him, "*idem edictum Prætoris primus diligenter composuit*," which, when taken in connection with what was said, cannot mean aught else than that Ofilius was the first who faithfully elaborated the edicts of the Prætors.²

New Revision of the Edict by Salvius Julianus.³

§ 49. The edict was not composed at once according to a determined plan, but was gradually formed. In the course of time many changes were made in, and many additions made to, it; hence there was an imperious necessity for a new classification and arrangement of it by expunging the obsolete, to connect related matter, and to divide the whole under proper heads. This was effected under Hadrian by Salvius Julianus, who was peculiarly qualified for this labor, he possessing every requisite for a practical recomposition of it.⁴ For he was not only a scientifically educated jurist, and as such was already qualified for such a labor,⁵ but he was also prætor⁶ (at least he had been nominated for that office) when he began this work, and as such had far greater privileges than a jurist simply, being authorized to amend, omit and to add. Hence it was that he undertook this labor at the instance and under the authority of Hadrian.⁷ His work probably was the retention

¹ fr. 2. § 44. D. 1. 2.

² It cannot mean that Ofilius himself composed the edicts; because to have done this he must have been a prætor, which he never was; nor can it well be that he wrote for himself a pamphlet which contained neither more nor less than the first careful revision of the edicts, because this is not only improbable, but the words which Pomponius subjoins, "*nam ante cum Servius duos libros ad Brutum perquam brevissimos ad Edictum subscriptos reliquit*," are inappropriate to this; *Sanio*, *Rechtshist. Abhandlungen und Studien*, Vol. I. Part 1, Königsberg, 1849, No. 2.

³ See particularly, *De Weyhe*, *libri tres edicti seu libri de origine fatisque juris-prudentiæ Romanæ*, Celle, 1821; *Tigerström*, *de ordine Digestorum*, pag. 462, *seq.*

⁴ Of him it is said, "*Perpetuum composuit edictum*:" Eutrop. lib. 8. cap. 17; Aurel. Victor de cæsar, cap. 19, speaks erroneously of the emperor Didius Julianus: "*qui primus edictum, quod varie inconditeque a Prætoribus promebatur in ordinem composuerit*." Justinian likewise mentions the *compositio edicti* in comparison with his compositions in the Const. *Tanta*, de confirm. Dig. § 18 (Cod. 1. 17); *Biener*, *comm. de Salvii Juliani*, Leipsic, 1809. The views on this *compositio edicti* under Hadrian, however, are very conflicting.

⁵ It is palpably erroneous in saying, in fr. 20. D. 40. 5, that "*Etsi alterum pedem in tumultu habere, non pigeret aliquid addiscere*" was Julian's maxim.

⁶ That he was prætor is shown by fr. 5. D. 40. 2. *Biener*, *supra*, is of opinion that the edict was first composed after he became prætor.

⁷ See Const. *Dedit* de confirm. Dig. § 18, where it is said, "*sed et D. Hadrianus*

out of the edicts of the prætors urbanus of such matter so far as it was applicable to his time in as brief a form as possible,¹ avoiding all contradictions, the rejection of all that was obsolete, and the making of such corrections and additions as the circumstances of the times required,² and the arrangement of the whole under proper heads.³ Hadrian caused this new revision to be confirmed by a special senatusconsult (C. E. 131).⁴ From that time the edict remained substantially the same and became a leading object in legal instruction.⁵ Julian himself wrote a commentary thereon,⁶ and after him many others, among whom Ulpian⁷ deserves especially to be mentioned.⁸

V. *Responsa Prudentum.*

§ 50. The jurists were always held in high esteem by the Romans. From the earliest times it was customary for private persons, as well as the magistrates themselves, to apply to them, and request their opinions in doubtful cases⁹ (§ 39, *supra*). Every jurisconsult had the right to give his opinion on the law, and before the time of Augustus, every such *responsum* was of equal authority—it had not the force of law, but was regarded as the opinion of a jurist. Augustus was the first to allow, by special grant, several distinguished

prie memorie, quando ea, quae a Pretoribus quotannis edicta fuerant, brevi complexus est libello, adsumpto ad id optimo Juliano."

¹ To this the following words in the above-mentioned Constitution, "brevi complexus est libello," seem to refer.

² fr. 3. D. 37. 8. contains such a *nova clausula* emanating from Julian.

³ Justinian himself styles him the *ordinatorem* edicti Prætorii perpetui. See. Const. 10. C. 4. 5.

⁴ Const. *Dedit* de confirmat. Dig. § 18.

⁵ *Biener, supra*, § 4. 6; *Wüstemann, Uebers. des Theophilus*, Pt. 1. p. 36, *seq.*; *Zimmermann, Rechtsg.* § 40; *Puchta, supra*.

⁶ Under the title *Digestorum libri XC.*

⁷ Ulpian wrote, among other works, libri LXXXIII. ad Edictum, the first 81 of which contained a commentary on the Edictum Prætoris, the two last a commentary on the Edictum Ædilium.

⁸ There exist only fragments of the edict. They are in *Ranchini*, edictum perpetuum Salvii Juliani restitutum in *Meermani*, Thes. T. 3. p. 235, in *Gothofredi*, quatuor fontes jur. civ., and copied therefrom into *Ottonis*, Thes. T. 3, and in *Hoffmann*, histor. jur. Rom. Vol. II. P. 1. p. 305. The most complete collection is in *Wieling*, fragm. edicti perpetui, Frankfurt, 1733. The history of the edict was written by *Hainceus*, histor. edictor. et edicti perpetui. In opusc. posth. Halle, 1744, p. 1-274, and in *Opp. T. VII. Sect. 2. p. 1-280*. For the literature of the edict see *Haubold*, inst. liter. T. 1. p. 331. The latest attempt to restore the edict is also by *Haubold*, and is to be found in his *Inst. jur. Rom. priv. hist. dogm. epitome*, Leipzig, 1821, p. 137, *seq.*, and also in his *Inst. jur. Rom. priv. histor. lineam*, edited by *Otto*, Leipzig, 1826, and printed therefrom in the French translation of the preface of the present manual of *Etienne and Warnkœnig*, à Mons, 1826, p. 177.

⁹ *Dei Tex*, Oratio de insigni honore, quo habiti fuerunt cum philosophi apud Græcos, tam Romæ jurisconsulti, Amsterdam, 1820.

jurists to respond in his name,¹ the natural consequence of which was that the opinion given by these jurists acquired greater authority. Hadrian subsequently ordered that when the opinions of these specially authorized jurists agreed they should have the force of law (*legis vicem*), and should be followed by the judges; but in case that they disagreed, the judge should pursue that opinion which he deemed to be most correct.² The general liberty of all the other lawyers, to give opinions on the laws, continued as theretofore, and consequently was not restored by Hadrian, as some have supposed.³ However, the *responsa* of those jurists who were not especially authorized by the emperor never had the force of law, but only the authority of a private jurist.⁴

VI. Jurisprudence.

§ 51. The scientific treatment of the law in this period attained its highest excellence, which was particularly owing to the connection of law with philosophy and Greek literature.⁵ In this period lived the most distinguished jurists that ever existed among the Romans—men whose clear and penetrating judgment advanced jurisprudence to a high state of perfection and cultivation, and who are, therefore, usually called the classical jurists. Their writings contained excellent elucidations and developments of the sources of law, and soon obtained a decisive authority in the courts, partly because the authors themselves often occupied the highest dignities of the state,⁶ and partly because the assistance of learned interpreters was indispensable in the practical application of the law of the Twelve Tables and the Edicts. Under Justinian the Pandects were compiled from the writings of these jurists.⁷

¹ fr. 2. § 47. D. 1. 2. To these jurists relates the passage in Gaius, I. 7, "*quibus permissum est jura condere*," as also the frequently occurring expressions, *juris auctores* and *juris conditores*. See e. g. fr. 17. pr. D. 37. 14.

When other *juris auctores* are spoken of they belong to an earlier period, to these the term *veteres* relates. *Dirksen*, Beitr. p. 159, seq.

² Gaius, I. 7. Comp. § 8. I. 1. 2. and Theophilus ad § 9. *ibid.* Only such opinions, however, as were written and sealed had this importance: fr. 2. § 47. D. 1. 2. cit.; *Briassonius*, de formulis III. 85, seq. Hence they belonged to the sources of the written law. § 3. I. 1. 2.

³ From the passage of Pomponius fr. 2. § 47. D. 1. 2.; *Gravina*, de ortu et progressu juris civilis, § 42; *Van Middelstum*, Diss. histor. critica ad L. 2. § 47. D. de orig. jur. Groningen, 1829.

⁴ See *Hugo*, Rechtsg. p. 810, seq.; *Warnkönig*, zu Gibbon, p. 118; *Holtius*, de auctoritate Ictorum Romanorum, Amsterdam, 1822; *Puchta*, Instit. § 116 and 117.

⁵ The influence of philosophy (which should not be confounded with logic), and particularly the stoical, on Roman jurisprudence has been too highly estimated by many. *Meister*, de philosophia Ictorum Romanorum stoica. Göttingen, 1756; *Rafjen*, Hat die stoische Philosophie bedeutenden Einfluss? Kiel, 1839; *Puchta*, Instit. § 102.

⁶ Especially because the *jus respondendi* was conferred on them. See § 50, *supra*.

⁷ *Leibnitz*, Op. Vol. IV. P. 3, p. 267. See, *Savigny*, Gesch. des R. R. im Mittelalter, Vol. 1, p. 4. 2d ed. p. 24, seq.

Celebrated Jurists before Augustus.¹

§ 52. The most distinguished jurists of this period, before the time of Augustus,² were *Q. Mucius Scævola,³ Aquilius Gallus,⁴ Servius Sulpicius Rufus,⁵ *Alfenus Varus,⁶ Ofilius,⁷ Trebatius Testa,⁸ Cascellius,⁹ Tubero,¹⁰ *Ælius Gallus,¹¹ and Granius Flaccus.¹²

¹ Concerning the Roman jurists of this period see Pomponius in fr. 2. § 41–47. D. 1. 2; *Gravina*, de ortu et progressu juris civilis, § 46, *seq.*; *Hoffman*, hist. juris, P. 1 (1734), p. 312, *seq.*; *Hugo*, Rechtsg. p. 817, *seq.*; *Neuber*, die jurist. Classiker Pt. 1, Berlin, 1806; *Zimmern*, Rechtsg., Vol. 1, § 53–103; *De Weyhe*, libri tres edicti p. 8, *seq.*

² Fragments of the writings of these jurists have been gathered from the citations of non-judicial writers by *Dirksen*, Bruchstücke aus den Schriften der röm. Juristen, Königsberg, 1814.

³ Pomponius, in fr. 2. § 41, says of him, “jus civile primus constituit,” and Cicero de orat. terms him “hominem omnium et disciplina juris civilis eruditissimum et ingenio prudentiaque acutissimum—jurisperitorum eloquentissimum, eloquentium juris peritissimum,” Cicero, Brut. c. 39, 40; *Van Randwyck*, Spec. continens vitas Ictor. Romanor. Quinti Mucii Scævola et Publii Rutilii Rufi., Groningen, 1826; *Puchta*, Instit. § 97.

⁴ M. Tullius Cicero, properly speaking, was not a jurist, but an orator and a philosopher; he united, however, to these considerable legal knowledge, and his writings, especially his forensic speeches, in which he sometimes appears for the plaintiff, and at other times for the defendant, are of great importance in the study of the ancient laws, and have, for this reason, been often commented on. See thereon the copious matter in *Haubold*, inst. jur. Rom. hist. dogm. ed. Otto (1826), p. 146, note c, to which should be added: *Massé*, de M. T. Ciceronis orat. in Verrem de jurisdictione Sicilianna, Leyden, 1824; *Rovers*, Diss. in M. T. Ciceronis orationem pro Roscio Comædo, Utrecht, 1826. Concerning a lost writing of Cicero's, which Gellius, I. 22, mentions, see, *Dirksen* on Cicero's lost writing, de jure civili in artem redigendo, Berlin, 1842.

⁵ Cicero Brut. c. 41; fr. 2. § 44. D. 1. 2; *Ottónis*, de vita et scriptis Servii Sulpicii: in his thes. T. 5. p. 1549; *Schneider*, quæst. de servio Sulpicio Rufo, Spec. I. et II, Leipsic, 1834.

⁶ *Ottónis*, Alfenus Varus; in his thes. T. 5. p. 1633.

⁷ *Sanio*, rechtshist. Abhandlungen und Studien. Vol. I. Pt. 1, Königsberg, 1849, No. 2.

⁸ *Gundling*, C. Trebatius Testa; cum præf. de Ictis Romanis illustribus. Gottl. Aug. Jenichen, Leipsic, 1736.

⁹ *Legemans*, Diss. de A. Cascellio Icto, Leyden, 1823.

¹⁰ *Vader*, de Q. Ælio Tuberone Icto ejusque quæ in Digestis extant. Fragmentis, Leyden, 1824.

¹¹ C. Ælii Gallii Icti de verbor. quæ ad jus civile pertinent significatione fragmenta. *Haimbach*, Leipsic, 1823; *Puchta* (Inst. end of § 97) doubts whether Ælius Gallus was a jurist. But see fr. 19. D. 22. 1; *Deurer*, Grundriss, § 68.

¹² The jurists designated in this and the following sections by a * are excerpted into the Pandects. Comp. the Index Ictorum Florentinus, which is also to be found in the *Göttingen* and in Beck's edition of the corpus juris civilis. See *Hoffman*, *supra*, p. 314. A complete list of the jurists quoted from is in *Wieling*, jurispr. restituta. P. 1. p. 72, and a list (though incomplete) of the commentators on single fragments of

Schools or Sects of the Roman Jurists since Augustus.

§ 53. After the time of Augustus the Roman jurists especially authorized to give opinions on the law (§ 50, *supra*) appear to have divided themselves more into certain schools or sects. Pomponius, at least in his legal history from that period to the time of Hadrian, with whom it closes, always presents two jurists in connection, who frequently differed from each other in their principles and views.¹ These schools, however, do not appear to be substantially other than separate bureaus (*stationes*) for the giving of opinions² with different elementary views of their founders, in which the pupils for several generations followed their teachers in many of such views.³ From this division and difference of views and principles there naturally arose many controversies, which were not only discussed in opinions but also in other legal writings; subsequently, however, these were settled either by imperial constitutions or by practice. The founders and most eminent adherents of both of these chief schools were the following:

*Antistius Labeo. ⁴	Massurius Sabinus (from him the name of Sabiniani).
Nerva, grandfather of the emperor of that name.	Caius Cassius Longinus (from him the name of Cassiani).
*Proculus (from whom his followers were termed Proculian).	Cælius Sabinus.
Pegasus.	*Javolenus Priscus.
*Juventius Celsus.	*Aburnus Valens. ⁵
Neratius Priscus.	*Salvius Julianus (§ 49, <i>supra</i>). ⁶
Ateius Capito.	

Celebrated Jurists after Hadrian.

§ 54. After Hadrian the distinction of the schools cannot be clearly traced. Many have supposed that the age of the eclectics or the so-termed *herciscundi* and *miscelliones* began at this time,⁷ but this opinion is groundless. For cer-

the several jurists is in *Sammet*, *Hermeneutik*, § 30-34; *Kriegel's* edition of the *corpus juris civilis*, p. 980, *seq.*, contains a list of authors, and where their writings are to be found in the work.

¹ fr. 2. § 47. D. 1. 2. Respecting these schools of Roman jurists, see *Gravina*, de ortu et progr. jur. civ. § 45; *Hoffmann*, hist. jur. P. 1. p. 312; *Mascovius*, de sectis Sabinianorum et Proculianorum, Leipsic, 1728; *Hugo*, Rechtsg. p. 382; *Zachariæ*, Gesch. des R. R. p. 223; *Dirksen*, Beiträge zur Kunde des Röm. Rechts., Leipzig, 1825, No. 1; *Zimmern*, Rechtsg. Vol. 1, § 64-67; *Puchta*, Inst. §§ 98 and 99.

² See *Gellius*, noct. att. Lib. 13. c. 13.

³ That is, those pupils who in their youth were practically instructed in those academies.

⁴ *C. G. Biener*, *Antistius Labeo juris civilis novatur*, Leipsic, 1786, and in works of *F. A. Biener*, Leipsic, 1830, Vol. 1, No. 9.

⁵ *Smeding*, de *Salvio Aburno Valente*, Leyden, 1824.

⁶ Of a jurist who is only known through fr. 9. D. 2. 12, and a work of Julian respecting him: treats. *Kiemmerer* de *Minicio Natali Icto Rom.*, Rostock, 1839.

⁷ *Festus*, sub. voc. *Miscelliones*; *Brunnquell*, de *jure consultis herciscundis*. In

tain it is that there were eclectics at an earlier period—even at the time of the schools—and it is also certain that there were adherents of the old schools among the jurists even after Hadrian.¹ The distinguished jurists after Hadrian are: *Taruntinus Paternus, *Mauricianus, *Papirius Justus,² Terentius Clemens, Volusius Mæcianus,³ *Æmilius Macer, Callistratus, *Trypho- ninus, *Ulpius Marcellus, *Sextus Cæcilius Africanus, *Ælius Marcianus, *Pomponius,⁴ *Cervidius Scævola,⁵ and most particularly, *Gaius,⁶ *Æmilius

opusc., p. 419. The term *herciscundi* arises from a misunderstanding of Cujas. Concerning it, see *Spangenberg*, *Einkl. das Röm. Rechtsb.*, p. 230.

¹ *Gaius*, I. 196; II. 15. 37. 217; III. 87. 98, and in several other passages, calls himself still a follower of the school of Sabinus and Cassius, whom he terms *nostri præceptores*. Proculus and his pupils he terms *diversæ scholæ auctores*. See also fr. 32. D. 39. 2; fr. 138. pr. D. 451; § 2. I. 3. 23. (24). S. Pomponius also appears as a Sabinian, especially in *Gaius*, II. 218; *Puchta*, *Instit.* § 99.

² *Pipers*, de *Papirio Justo Icto*, Leyden, 1824.

³ A small work of his on the division of the *as* has been preserved, and was first published by *Richard* in his edition of the *Breviarii Alariciani* (Basel, 1528), afterwards in *Grævii thes. antiq. Rom.* T. XI. p. 1706, and at last under the title *L. Volusii Mæciani assis distributio et Balbi mensoris de asse libellus*, Ed. by *Böcking*, Bonn, 1831. This edition is also inserted in the *Corp. jur. Antejust.* Fasc. 1, p. 173–192.

⁴ Many have erroneously thought that there were two named Pomponius: *Deurer*, *Grundriss*, § 85, 34. The *Enchiridion juris* has been taken from a number of writings of this jurist, most of which have been used in the Pandects. From that work a large fragment on the sources of law, the *magistratus*, and the jurists till the time of Hadrian (§ 53, *supra*), has been incorporated into the Pandects (fr. 2. D. 1. 2.); *Sexti Pomponii de origine juris*; *Haubold*, Leipzig, 1792; *Schrader*, *editionis Digestor.*, Berlin, 1837; *Pomponii de orig. jur.*; *Osannus*, Giessen, 1847. The criticisms of Cujas, Bynkershoek and others on Pomponius are collected in *Uhle*, opusc. and *hist. jur. et max. ad Pompon.*, Halle, 1735. In addition to the foregoing, there exists a small fragment of his *liber singularis regularum* on the indivisibility of servitudes: *Fragmentum Sexti Pomponii cura*, *Boecking*, Bonn, 1831. In *Corp. jur. Antejust.* Fasc. I., p. 169.

⁵ *Conradi*, de *vita et scriptis*, Q. *Cervidii Scævola*, Leipzig, 1755.

⁶ On his writings, see *Bach*, *hist. lib. 3. c. 2. sect. 5. § 14. 15*; *Zimmern*, *Rechtsg.*, Vol. 1, § 93. *Gaius*' most important work for us is his *Institutes*, because they are the basis of Justinian's *Institutes*. For a long time they were only known in a much altered Visigothical edition in the *Breviario Alariciano* (§ 68, *infra*); they are also in *Schulding*, *jurispr. Antej.* p. 1, and in the *Berlin Jus. civ. Antej.* T. 1, p. 187, and recently they have been published with critical annotations by *Boecking*, under the title *Gaii Institutionum libri duo et fragmentum Papiniani ex lege Romana Visigothorum*, Bonn, 1831. It is also in *Corp. jur. Antejust.* pars alt., p. 1, *seq.*

In the year 1816 Niebuhr discovered, in the library of the cathedral chapter of Verona, the genuine *Institutes* of *Gaius* in a *Codex rescriptus*. This *Codex Veronensis* was first published in the year 1820 from a copy of it made by *Goeschen*, *Bekker*, and *Bethmann-Hollweg*, under the title *Gaii Institutionum commentarii IV. e codice rescripto bibliothecæ capitularis Veronensis*, Berlin, 1820. It has a *prolæus* by *Goeschen*, in which he gives a minute history of this discovery, with refer-

Papinianus,¹ *Domitius Ulpianus,² *Julius Paulus,³ and *Modestinus.⁴ Less distinguished, though their writings have been excerpted, are *Tertullianus,

ences to the writings, in which the first information of this discovery was communicated, the condition and age of the code, and also explains the method of criticism observed in editing it. The text of this edition, which contains many illegible places, has been furnished with critical notes and parallel as well as other passages by various learned men, particularly Hugo, Savigny, Haubold, Cramer, Goeschen, Hollweg and Biener. Appended to this is the *Fragmentum veteres Icti de jure fisci*, discovered at the same time at Verona.

In the year 1824 the second, much enlarged and improved, edition of Gaius by Goeschen appeared, which was considerably enriched by comparisons made with the *Codex Veronensis* by Blume and by the use of criticisms of other learned men.

A third much improved edition was published in 1842, after Goeschen's death, by Lachmann.

The simple text of Gaius, according to the first Berlin edition thereof, is in the *Ecloga juris civilis*, Paris, 1822; also in *Gaii institutionum comm. IV.* by Hartmann, Leipzig, 1825. And is also in Vol. 2 of Blondeau's collection, which was published in Paris, 1839, under the title *Institutes de l'empereur Justinien*, etc.

There are the following new editions of Gaius: the fourth book of Gaius, with many corrections and explanatory notes, *Heffter*, Berlin, 1827, 4to; the entire Gaius, cura, *Heffter*, Bonn, 1830. A collection of the *Institutes of Gaius and Justinian*, with critically corrected text and notes, is contained in *Gaii et Justiniani Institutiones juris Romani*, *Klenge et Böcking*, Berlin, 1829. An anonymous publication by *Böcking*, *Gaii institutionum commentarii IV.*, Bonn, 1837. In 1841 there was issued in Bonn, to supply the place of the exhausted edition of *Heffter*, *Gaii instit. commentarii IV.*, *Lachmannus*. After this appeared the second Böcking edition of Gaius, Bonn, 1841, 12mo. There are the following translations of Gaius: The *Institution en-Commentaire des Gaius*, with notes by *Brockdorff*, Vol. I., Schleswig, 1824; *Institutes de Gaius traduites en françois*, par *Boulet*, Paris, 1827, 1828; *Institutes of Gaius translated into French*, *Domengel*, Paris, 1843; a German translation of Gaius' *Institutes*, by *Beckhaus*, Bonn, 1857. There are two English translations of Gaius: one by Edward Poste, Oxford, 1871; the other by J. T. Abdy and Bryan Walker, Cambridge, 1874. Of the remaining numerous writings of Gaius there exist only some passages in the *Pandects*. A particularly valuable book appears to have been his *Res quotidianæ s. Aurea*. This probably either was a new arrangement of his earlier *Institutes* or contained simply addenda, corrections or matter for such purpose, and was made use of in Justinian's *Institutes*, Proem. I. § 6.

¹ Respecting his writings (see *Bach*, *supra*, § 19) we have naught more than appears in the *Pandects*, in the *Vaticanis Fragm.* and in the *Collatio Legum Mosaicarum et Romanorum* (§ 57, *supra*), and the short passage, *de pactis inter virum et uxorem*, at the end of the *Brev. Alariciani*. These are also in *Schulting*, p. 810, in *Jus. civ. Antej. Berol. T. I.* p. 245, and on the last page of the Böcking edition of the Visigothic Gaius enumerated in note 6, p. 35, *supra*. See *Haubold*, *Inst. lit. T. I.* p. 285; *Zimmern*, *Rechtsg.* Vol. 1, § 98.

² *Bach*, *supra*, § 25-28; *Zimmern*, *Rechtsg.* Vol. 1, §§ 100. 100 a. The most of his writings have been incorporated into the *Pandects*. Some of them are in the *Vaticanis Fragm.* and in the *Collatio*, § 66, *infra*. In addition to which we have an important part of his *liber singularis rerum*, which like Gaius has come to us in a

³ For notes 3 and 4 see page 37.

*Rutilius Maximus, *Licinius Rufinus, two or three named *Saturnine, *Arrius Menander, *Furius Anthianus, and *Florentinus.

single genuine manuscript, which at present is in the Vatican Library. Its title is *Tituli ex corpore Ulpiani*. The moderns term it *Ulpiani Fragmenta*. Respecting this manuscript see *Savigny*, *verm. Schriften*, Vol. 3, No. 22. The identity of this manuscript is disputed by *Heimbach*, *über Ulpian's Fragmente*, Leipzig, 1834. It was first published by *Dutillet* (*Tilius*), assisted by *Cujas*, with the title *Tituli XXIX. ex corpore Ulpiani*, Paris, 1549. Respecting later editions see *Hugo*, *index editionum fontium* in the back of his edition of *Pauli*, *sentent. receptæ*, Berlin, 1795; *Haubold*, *inst. lit. T. 1. p. 275*. It is also in *Schulting*, p. 537. More recently *Hugo* is entitled to especial credit for his editions of this work. He first published it with the title *Domitii Ulpiani Fragmenta libri regularum singularis, uti videtur, vulgo XXIX. tituli ex corpore Ulpiani*, Berolini, 1788; afterwards in 1811, and as a part of the new Berlin edition of the *Jus civile antejustinianum*; the fourth edition in 1822, and the fifth edition in 1834. A 12mo edition was issued in Bonn in 1831, edited by *Böcking*. It is also in the *Corp. jur. Antejust. Fasc. I. p. 121*, and a fourth and improved edition, Leipzig, 1855. Especially should be noticed, *Schilling*, *Diss. critica de Ulpiani fragmentis*, Vratislavæ, 1824. His *animadversiones critica*, Leipsic, 1830, 1831. Recently a small fragment of Ulpian's *Institutes* has been discovered in Vienna, *De Ulpiani institutionum fragmento in bibliotheca Palat. Vindob.* *Epistola ad de Savigny*, scripsit *Stephanus Endlicher*, Vindob. 1835. This fragment is copied into the second and third *Böcking* editions of Ulpian's fragments, and in the latter in facsimile. *Savigny*, *verm. Schriften*, Vol. 3, No. 31; also No. 28. An English translation of Ulpian is appended to the English translation of *Gaius*, *supra*, note p. 36.

³ *Beck*, *supra*, § 30–35; *Haubold*, *supra*, p. 276; *Zimmern*, *Rechtsg.* Vol. 1, §§ 100. 100 a. His works have been used more in the Pandects than any other excepting Ulpian's. Many passages are also contained in the Vatican fragments and the *collatio* (§ 66, *infra*). The *sententiæ receptæ* are particularly prominent, of which much has been incorporated into the Pandects. We have not the original of this work, but possess a Visigothical edition in the *Breviario Alariciano* (*De Schröter*, *observ. Jur. civ.*, Jena, 1826, obs. 3). This writing is in *Schulting*, p. 187, was separately published by *Hugo*, Berlin, 1795, and is also inserted in the Berlin edition of the *Jus civile antej.* and in the Parisian *Ecloga juris civilis* (see the preceding note 6, pp. 35, 36). The most critical edition thereof before the *Haenel* edition of the entire *Lex Visigothorum* is, *Julii Pauli receptarum sententiarum libri quinque cum interpretatione Visigothorum. Recognovit, annotatione, Arndts*, Bonn, 1833. To which belongs *Haenel*, *varietas scripturæ ex Pauli a Visigothis epitomati codicibus*, Bonn, 1834. It is inserted with this appendix in the *Corp. jur. Antejust. p. alt. p. 41, seq.* The *Fragmentum veteris lcti de jure fisci*, which is spoken of in note 1, p. 38, *infra*, is ascribed by some to Paul.

⁴ *Beck*, *supra*, § 41; *Haubold*, *supra*, § 285; *Zimmern*, *Rechtsg.* Vol. 1, § 102. A small fragment of his *Regularum libro III. tit. de bonis libertorum* is in *Schulting*, p. 801, as also in *Jus civ. Antej. Berol. T. 1. p. 245*, and is also published by *Böcking*, Bonn, 1831, and in the *Corp. jur. Antejust. Fasc. I. p. 169*. His most important work treats, however, of *excusationibus tutorum et curatorum* in the Greek, from which much was inserted in the Pandects. See *Kriegel*, *antiqua versio latina Fragmentorum e Modestini libro de excusationibus in Dig. obviatorum in integrum restituta*, Leipsic, 1830.

The Writings of Jurists.

§ 55. From the number of more or less distinguished jurists who have been mentioned, as well as from the occasional remarks respecting their literary labors, the great productiveness of the legal literature of this period may be inferred.¹ It may be classed as follows:

1. Commentaries on single sources of law, especially on the Twelve Tables, the Edict, single resolutions by the people and senatusconsulta.
2. Systems which were either abridgments, under the title of *Institutiones*, *Regulæ*, *Definitiones*, or larger and more copious works, particularly *Digesta*.
3. Commentaries on systems of other jurists, such as the *Libri ad Sabinum*.
4. Extracts from larger works, such as *Javolenus ex Cassio*, *Alfeni digesta a Paulo epitomata*, and annotations on them, such as the notes of *Ulpian* and *Paul* to *Papinian*.
5. Monographs or treatises on single subjects matter (*libri singulares*).
6. Casuistical writings, such as *Responsa*, *Epistolæ*, *Quæstiones*.
7. Controversies, *Disputationes*.
8. Miscellaneous writings, such as *Libra variarum lectionum*, *membranarum*, *differentiarum*, etc.

¹ We possess, in addition to the original works of Gaius and Ulpian (mentioned in note 6, p. 35, and 2, p. 36, § 54, *supra*), the Visigothical Paul (§ 54, note 3, p. 37, *supra*), and what has otherwise been obtained through the *Breviarium Alaricianum*, the Vatican Fragments, the *Collatio legum Mosaicarum et Romanorum* (§ 66, *infra*), and Justinian's Pandects, out of the writings of the Roman jurists; also several particular fragments of juridical writings of this period whose authors cannot be determined.

I. The first bears the title *Fragmentum regularum veteris Icti de juris speciebus et manumissionibus*. It was preserved by the grammarian *Dositheus*, who lived at the commencement of the third century. See *Haubold*, *supra*, p. 272; *Hugo*, *Rechtsg.* p. 902; *Zimmern*, *Rechtsg.* Vol. 1, § 7, and especially *Schilling*, *Diss. crit. de fragmento juris Romani Dositheano*, Leipsic, 1819, which, in addition to valuable notes, contains a critical revision of the text. The last edition is by Böcking, 1855, in the appendices to Ulpian, p. 158, *seq.*, bearing the title *Fragmentum veteris Icti regular*, etc. It is also in the *Corp. jur. Antejust. Fasc. I.* p. 193 (*Lachmann*), *Versuch über Dositheus*, Berlin, 1837.

II. The second bears the title *Fragmentum veteris Icti de jure fisci*. It was discovered simultaneously with the Institutes of Gaius at Verona, and is published in the Berlin edition as an appendix to them. See § 54, *supra*, note 6, p. 35, and 3, p. 37; *Zimmern*, *Rechtsg.* Vol. 1, p. 26. A new critical edition has been published by Böcking, Bonn, 1831. It is also in the *Corp. jur. Antejust. Fasc. I.* p. 157. Respecting its age and author, see *Walch*, *de ætate fragmenti veteris Icti de jure fisci*, Jena, 1839.

FOURTH PERIOD.

FROM ALEXANDER SEVERUS TO JUSTINIAN.¹

(After Christ, 250-550.)

Changes in the Roman Empire.

§ 56. After the death of Alexander Severus (C. E. 235) the Roman empire, once so mighty, but now subverted, hastened rapidly to its fall. The prætorians now throned and dethroned the emperors, and the constitution was soon transformed into a complete military despotism. The confusion attained its greatest height when, under Valerian (C. E. 250-260), the German tribes, the Allemanni, the Franks, the Goths and the Herules invaded the Roman provinces. Diocletian (C. E. 284), it is true, revived the empire's dwindling strength, but it was also under him that its divisions commenced. Constantine (306-337) revived ancient Byzantium, which, since its enlargement and embellishment, he termed Constantinople; it became the second city of the empire, and was made by him the seat of government. From his time the Christian became the predominant religion, and the Latin language in the Orient was gradually displaced by the Greek.

The empire under Constantine's sons was divided anew, and again divided under the sons of Theodosius, from whom Arcadius obtained the Orient and Honorius the Occident (C. E. 395). Though this last great division remained, yet Roman province after province was lost by the continual increasing pressure of the barbarians, whom the weak occidental emperors could not withstand. In the beginning of the fifth century Alaric, king of the Visigoths, made an attack on Italy and plundered Rome; the Alani, Vandals and Suevi advanced through Gaul to the Pyrenean peninsula, and thence to Africa; the Franks, Burgundians and Ostrogoths* took possession of Gaul, Helvetia, and the country bordering the Rhine; Britain became the spoil of the Saxons, and Attila, with his invincible Huns, invaded Gaul (about the year 450) and threatened the western empire with speedy destruction. The court of Constantinople was compelled to be an inactive spectator of the storms raging in the west; for its weakness, and still more its narrow-minded policy, availed naught in attempting the relief of that empire, till finally the existence of the western empire of the Romans was destroyed by Odoacer (year 476). The Roman dominion of the world was now limited with but occasional exceptions to the oriental empire,² which it continued to retain till the year 1453, when it was destroyed by the Turks.

The State Government.

§ 57. The disturbances in the beginning of this period resulted in the emperor becoming the sole and unlimited possessor of all the sovereign

¹ *Europ. Rechtsg.* p. 962-1109.

² Justinian, indeed, reconquered Italy, but it was finally lost under his immediate successor.

power.¹ Even the last traces of the *comitia* disappeared. Indeed, a senate yet remained, and precisely such a one was instituted in Constantinople as had existed in Rome;² but its political importance was limited to its apparent co-operation in the election of the emperor,³ and when it announced laws or codes the emperor, when so disposed, confirmed them in advance.⁴ There yet existed some of the former republican magistrates,⁵ who continued to be chosen by the senate. The consuls, however,⁶ who required the imperial confirmation, notwithstanding their high station, had no longer power.⁷ The remaining officers, such as the prætors,⁸ fell into subordinate positions, and were subject to the emperor equally with the officers who were solely chosen by him.

The administration of the State Government.

§ 58. The organization of the administration of the government became more important from the simplicity of the government itself.⁹ The emperor required for his service a large number of officers, who collectively were his servants, and who drew salaries (*sacræ largitiones*). Their subordination to

¹ See, e. g., Novel 105. c. 2. § 4. in f. He also surrounded himself with an oriental court. His kin took very high rank with the title of nobility: *Zosim.* II. 39. c. 21; *C. Th.* 13. 1; *J. Gothofred.* ad h. l. The oriental emperors (at least from the time of Leo) permitted themselves to be crowned: *Theophanis*, chronograph. ed. Paris, p. 95. See *Walter*, *Rechtsg.* § 339.

² *Zosim.* II. 2; III. 11.

³ This proceeded, however, from the armies or predecessors in government: *Walter*, *supra*, notes 14, 15.

⁴ *Const.* 3. C. 1. 14. This occurred in Rome with the Theodosian code (§ 64, *infra*, note 5), and Theodosius II. and Valentinian III. promised that it should be general for the future in *Const.* 9. C. eod. tit.; however, this promise appears to have been but rarely fulfilled, notwithstanding *senatusconsults* still appear, *Const. un. C. de senatusconsultis* (1. 16), but they only related to the circumstances which affected the senate as a corporation, e. g., the senatorial games: *J. Gothofred.* ad *Const.* 1. C. Th. 159. Generally the emperor associated the senate with him in the administration of law. See *Walter*, *supra*, § 371.

⁵ *Walter*, § 367, *seq.*; *Puchta*, § 124.

⁶ During the division of the empire there was usually a consul in Rome and one in Constantinople: *Procop.* hist. arc. c. 26. Under Justinian there was the first omission for several years to choose a consul (see § 75, *infra*), and after the consulate of Basilus, in the year 541, such omission was permanent. Hence, during this time the designation of the year by the words *post Consulatum Basilii*, to which, from the year 543, there was yet added II. or III., etc.

⁷ *fr. un. D.* 1. 10; *Walter*, § 367. Under Justinian the presidency of the senate was also transferred to the *præfectus urbi*: *Walter*, § 371, note 116.

⁸ Their number, as also the choosing of the individual members, changed: c. 5. 13. 20. 25. *C. Th.* 6. 4. According to the latest ordinance of the *Cod. Just.*, in a capital city there should be three: *Const.* 2. C. 1. 39; *Walter*, § 370.

⁹ The chief source hereof is the *Notitia dignitatum* (§ 66. 2, *infra*), and the most important modern writing: *Bethmann-Hollweg*, *Gerichtsverfassung und Process des sinkenden, Röm., Reichs*, 1834; *Puchta*, § 121, *seq.*; *Walter*, § 360, *seq.*

each other and the consequent closer union of their respective ranks was precisely fixed.¹ The central government² was administered by the emperor, partly through the ministers of the several departments,³ viz., the *magister officiorum*, the *quæstor sacri palatii*, the *comes sacrarum largitionum*, and the *comes rei privatæ*,⁴ and partly through his counsellors of state, who since Diocletian were no longer termed *consilium*, but *consistorium principis*,⁵ and consisted of two kinds of members, namely, of those who had the direction of certain subjects-matter,⁶ and of others who counselled in simple state matters (*comites consistoriani*).⁷ The remaining government Constantine wholly reorganized. He divided the empire into two capital cities and four præfectures;⁸ each of the capital cities⁹ to be governed by a *præfectus urbi*, who had a number of subordinate officers, included in which were the prætors. A præfecture was divided into several dioceses and a diocese into several provinces.¹⁰ The chief of an entire præfecture was a *præfectus præto-*

¹ The highest officers were *illustres s. magnifici s. excellentissimi*. A second class formed the *spectabiles*; a third, to which also the several senators belonged, the *clarissimi*: *Bethmann-Hollweg, supra*, p. 43; *Puchta*, § 121; *Walter*, § 402. The *perfectissimi* and the *egregii* belonged to a fourth and fifth class of rank. These two attributes indicate only the rank and not the meritorious station of them to whom it was given. Respecting the *perfectissimi* see, *J. Gothofred, paratitl. ad C. Th. 6. 37*, and respecting the *egregii*, *J. Gothofred, ad Const. 1. C. Th. 6. 22*. The officers who have a *dignitas* must be distinguished from those who only belong to an *officium*, that is, to the numerous personal services which are connected with a position. Previous to Constantine this consisted of *militæ*, and hence such a position was at a later period also termed militia. A part of this *militiæ* was alienable and inheritable. The *officia* is treated of very fully by *Bethmann-Hollweg, supra*, § 15, p. 180, *seq.*; *Puchta*, § 127; *Walter*, § 404.

² The dignities of the central officers belonged to the *dignitates palatinæ*; their officials were termed *palatini*.

³ *Bethmann-Hollweg*, p. 98, *seq.*; *Puchta*, § 122; *Walter*, § 362-366.

⁴ On the state household, which both of the latter directed, see *Walter*, § 405-413.

⁵ *Bethmann-Hollweg*, p. 109, *seq.* In litigations the usual name is *auditorium*.

⁶ The ministers had this, each in the matters of his department, and the *præfectus prætorio* in the matter relating to his præfecture.

⁷ The latter belonged to the *spectabiles*.

⁸ These were termed Oriens, Illyricum, Italia and Gallia. At a later period the first two formed with Constantinople the east Roman and the last two formed with Rome the west Roman empire, till the latter ceased (§ 56, *supra*). But Justinian, after his victory over the Vandals in the year 534, to his previous two præfectures added a *præfectura Africæ*; and subsequently, after the conquering of Italy in the year 554, he added again thereto a *præfectura Italiæ*, so that he numbered as many præfectures as Constantine.

⁹ *Walter*, § 335, *seq.*; *Puchta*, § 124.

¹⁰ According to the *notitia dignitatum* of the fifth century there were then the following divisions:

1. The *præfectura Orientis* into the dioceses of Oriens, Ægyptus, Asia, Pontus and Thracia, and into forty-eight provinces.

rio.¹ A diocese had its especial chief, who was usually termed *vicarius*, and under him was the chief of a single province,² who was usually termed *præses*.³ These officers for several parts of the empire were restricted to the administration of justice and civil matters.⁴ For the army special commanders were chosen.⁵ The chief command was by *magistri militum*, of which, by the ordinance of Constantine, there were two;⁶ but at a later period there were several, each in a different part of the empire, of whom two were at the imperial court.⁷ Under each of such commanders there were several subordinate commanders, part of whom were termed *duces* and part bore the higher title of *comites rei militaris*.⁸ There was an ecclesiastic division of the empire similar to the division into præfectures, etc. At the head of the ecclesiastics stood the patriarchs; under these were the metropolitans or archbishops, and under these the bishops.⁹ To these ecclesiastic regents, like to the military commanders,¹⁰ there was assigned a certain jurisdiction.¹¹ The communal authorities of small communities under cities with governors¹² had to co-operate in the exercise of several sovereign rights. The curials (*decurions*) were responsible for the amount of the city's taxes, and had to pay the same

2. The *præfectura Illyrici* into the dioceses of Macedonia and Dacia, and into eleven provinces.

3. The *præfectura Italix* into the dioceses of Italia, Illyricum and Africa, and into twenty-nine provinces; and

4. The *præfectura Gallix* into the dioceses of Gallia, Hispania and Britannia, and into twenty-nine provinces.

¹ Previous to Constantine the *præfectus prætorio* was the commander of the prætorians, and was at the head of the ministry. But Constantine dissolved the body of the prætorians and appointed the *præfecti prætorio* as civil regents of the greater part of the empire. He whose præfecture was the nearest to the court followed it and was termed *præfectus prætorio præsens* or *in comitatu*. The *præfectus prætorio* is treated at length by *Lydus*, de magistratib. I. 14; II. 10. 11; III. 41; *Walter*, § 366; *Puchta*, § 123.

² The *præfectus prætorio* belonged to the *illustres*, the *vicarius præfecti prætorio* to the *spectabiles*, and the *præses*, finally, to the *clarissimi*.

³ Sometimes he bore a higher title, with which was connected not only a higher rank, but an adequate exemption from the subordination mentioned. On this see, *Walter*, Rechtsgesch. § 387, seq.; *Puchta*, § 123.

⁴ They had *dignitates civiles*.

⁵ *Walter*, § 362. They had *dignitates militares*.

⁶ One for the *pedites* and one for the *equites*: *Zosimus*, II. 33.

⁷ At the time of the *notitia dignitatum*, in the east Roman empire two were at the court and three at other places, and in the west Roman empire two were at the court and one in Gaul: *Walter*, §§ 362, 363; *Puchta*, § 125.

⁸ C. Th. 4. 14; C. Just. 12. 12; *Gothofred*, paratitl. ad C. Th. 7. 1.

⁹ *Burchardi*, Lehrb. des R. R. Vol. 1, § 130.

¹⁰ C. de officio militarium judicium (1. 46).

¹¹ C. de episcopali audientia, etc. (1. 4).

¹² Respecting the whole of the following see, *Savigny*, Geschichte des Röm. Rechts im Mittelalter, Vol. 1, Cap. 2.

to the city *curiæ*.¹ Indeed the position of curial was extremely burdensome, and hence was much avoided. Respecting this there are numerous ordinances.² A limited jurisdiction, similar to what the magistrates in the Italian cities always had, was also given to the non-Italian cities. They were given the *defensores civitatum*,³ which was speedily introduced, according to the Constantinean organization of the government, into the several parts of the empire; their principal purpose was to protect against the oppressions of the imperial officers.

Alterations of the Roman Law.

§ 59. In this period the changes of the law were almost exclusively effected⁴ by imperial constitutions and by customs. The constitutions increased in number with the increasing power of the emperor. Their texts and objects differed as greatly as they formerly did (§ 46, *supra*).⁵ During this period, before Constantine, there were not many edicts affecting the private law;⁶ but from the time of Constantine there was a large number which contained numerous reforms, the most of which were for the purpose of better adapting the Roman law to the countries other than Italy, incorporated into the empire,⁷ and having equal authority, or were due to the changes in the form of government, and the consequent changes in the form of the judiciary and the administration of justice.⁸ The edicts were now often addressed to the highest officers, or to the senate, who were to give them further publication, sometimes to the people themselves (*ad populum* or also *ad omnes populos*), and were termed *leges edictales* or *generales*, or *leges* simply. By⁹ an ordinance of Arcadius and Honorius,¹⁰ and repeated by Theodosius II. and Valentinian

¹ On this point see, *Walter*, *Rechtsgesch.* § 374, *seq.*; *Puchta*, *Instit.* end of § 123. note b, *seq.*

² *Const.* 1. C. 1. 55. Through this and through Constantine's new division of the empire an important distinction between Italy and the former provinces was obliterated. Another distinction had ceased already under Diocletian, because Italy at the then first division of the empire lost its exemption from taxes. The last distinction ceased when Justinian permitted the *prædia provincialia* to have actual private property: *Const. un.* C. 7. 31.

³ *C. de defensorib. civitatum.* (1. 55); *Walter*, § 394; *Puchta*, § 123.

⁴ However, the *præfecti prætorio* retained also in their new position to which Constantine appointed them, of course each only for his præfecture, the authority given to them by Alexander Severus, in *Const.* 2. C. 1. 26, to make ordinances (*formæ*) which did not conflict with any imperial law. *Const.* 16. C. 3. 1; *Const.* 27. C. 8. 41; *Zachariæ*, *hist. jur. græco. rom.* p. 7.

⁵ *Haubold*, *inst. jur. Rom. hist. dogm.* § 161; *Löhr*, *Uebersicht der das Privatrecht betreffenden Constitutionem*, 1st Progr., Wetzlar, 1811, 2te Progr., 1812.

⁶ There are, also, some from Diocletian, 1247 of his constitutions have been inserted in the *Cod. Just.*, and among them 1220 rescripts.

⁷ The new court in the far east, also, then co-operated therein.

⁸ See *Puchta*, *Instit.* § 129.

⁹ *Puchta*, § 131.

¹⁰ *Const.* 11 (9) C. Th. 1. 2.

III.,¹ and by Justinian,² an imperial rescript shall not be a law in any other case than that in which it was made. By an ordinance of Theodosius II. and Valentinian III.,³ it will, as an exception, be a general law if it be so stated in the rescript, and otherwise will be presumed to be a general law if the term edict be inserted (*inserto edicti vocabulo*), or, as Justinian⁴ adds, if it contain an authentic interpretation of a *lex generalis*. Justinian gives the proper *decreta principis* the force of a general law.⁵

Decline of Jurisprudence.⁶

§ 60. Jurisprudence, which had attained its meridian under Hadrian, the Antonines and their immediate successors, soon ceased to progress or have life after the internal destruction of the empire, subsequent to the death of Alexander Severus. All the sciences decayed, and the old Roman spirit expired beneath the oppression of despotism and the corruption of morals.⁷ There were but few eminent jurists in this period, and of all those who lived before Justinian, the following only deserve to be named: Gregorianus, *Hermogianus,⁸ *Aurelius Arcadius Charisius, and *Julius Aquila, because the latter three are quoted in the Pandects,⁹ and the former two prepared collections of the constitutions (§ 63, *infra*).

State of the Law Sources at the beginning of the Fifth Century.

§ 61. At the beginning of the fifth century, the state of the law sources was as follows: Theoretically the Romans continued to regard as the law sources the ancient decrees of the people, the senatusconsults, the edicts of the Roman magistrates, imperial constitutions and unwritten customs. The law of the Twelve Tables still formed the basis of the whole, and all later laws had the relation to them of additions or modifications. But in practice

¹ Const. 2. C. 1. 14.

² Const. 13. C. 7. 45. All these ordinances speak only of the rescripts made in response to the request of the judges (*ad consultationem*), and not to those in response to the parties. Probably the new rule previously affected the latter. In Justinian's novels the latter kind of rescripts are first deprived of all effect, and afterwards the judicial *consultationes s. relationes ante sententiam* are forbidden: Novel 113. c. 1; Novel 125.

³ Const. 3. C. 1. 14.

⁴ Const. 12. § 1. C. 1. 14; *Puchta, supra*, § 131.

⁵ Const. 12. pr. C. 1. 14.

⁶ *Puchta*, § 129, note b, *seq.*; *Walter*, § 447.

⁷ To comprehend how low jurisprudence had fallen at this period, recourse need only be had to the decree of publication of the Theodosian Code and compare it with Ammianus Marcellinus, lib. 30. c. 4.

⁸ This jurist, distinguished among his contemporaries, made extracts from the older jurists, which afterwards were used in the Pandects, and were entitled *Juris Epitomarum libri VI.*; *Finestres et de Monsalvo* in *Hermogeniani juris epitom.* 2 Tom., Cervera, 1757; *Bach*, *histor. juris*. Lib. 3. c. 3. sect. 4; *Hugo*, *Rechtsg.* p. 1091.

⁹ *Haubold*, *inst. hist. dogm.* § 195; *Zimmern*, *Rechtsg.* Vol. 1, § 104-106.

only the writings of the classical jurists and the constitutions were used as sources.¹ The jurists, however, had done much for the judges, and for the practical application of the law sources, in facilitating, by their labors, access to the law, even to the unlearned. Their works, therefore, obtained a well-merited authority in the courts—they were numerous;² but at the decline of science they continually became rarer. In consequence of which the most of the unlearned judges of that time were unable to investigate the principles on which the opinions of the jurists were based; they were generally contented with distinguished names, or with opinions whose reasons they happened to know. It became a general custom to blindly follow the *dicta* of a great jurist, and since even the most sagacious Roman law writers differed on many matters,³ it may easily be imagined how vague, uncertain and arbitrary the administration of justice must have become in the hands of such judges.

Ordinances of Constantine, Theodosius II. and Valentinian III. respecting the Writings of the Jurists.

§ 62. Respecting the foregoing circumstances, Constantine already appears to have felt the necessity to determine by special ordinances which writings of the old jurists should have particular legal authority and which should be disregarded.⁴ A similar but more comprehensive ordinance was subsequently promulgated (year 426) by Theodosius II. for the eastern empire, but which soon after also acquired legal authority in the west under Valentinian III.⁵ This ordinance, which is usually erroneously⁶ attributed to Valentinian III., and hence is termed Valentinian's law of quotation, provided that all the writings of Papinian, Paulus, Gaius, Ulpian and Modestinus, and the writings

¹ Savigny, *Gesch. des R. R. im Mittelalter*, 2d ed. Vol. 1, p. 27.

² Gibbon, *Rom. Hist.* Ch. 44, Vol. 5. See Const. 2. § 17. C. 1. 17.

³ Respecting the case when they agreed. See Gaius, I. 7. and § 50, *supra*.

⁴ This is already shown by Const. un. pr. Cod. Theodos. 9. 43 (of Constantine), that Constantine forbade reference to the notes of Ulpian and Paul on Papinian; and the *Consultatio veteris Icti*, § VII (Schulting, p. 821), shows that the sent. rec. of Paul was regarded as high authority by the imperial constitutions. Further proofs are given by two hitherto unknown constitutions of Constantine, discovered by Clossius in the Ambrosian Library at Milan, which also explain the passage "*sicut dudum statutum est*" in the citation law of Theodosius II. and Valentinian III. See *Theodosiani Codicis genuini fragmenta*, etc., Clossius, Tübingen, 1824, p. 35. Hugo, *Rechtsg.* p. 1014. They are now Const. 1. 2. C. Th. de responsis prudentum (1. 4). According to Justinian's Const. 1. § 4. C. 1. 17, there was an ordinance by which Marcian's notes to Papinian should not be regarded.

⁵ It is in the Code Theodosian as Const. 3 (formerly as C. un.), de responsis prudentum (1. 4). See Haubold, *Exerc. de emendatione jurispr. ab Imp. Valentiniano III. instituta ad L. un. C. Th. de responsis prudentum*, Leipsic, 1796, and in his works ed. Wrenck et Stieber, Vol. II. p. 1; Hugo, *Rechtsg.* p. 883, 1023; Savigny, *supra*, Vol. 1, 2d ed. p. 28; Puchta, *Instit.* § 134; Sanio, *Rechts. histor. Abhandl. und studien*, Vol. 1, Pt. 1, Königsberg, 1845, No. 1; Walter, § 443.

⁶ Hugo, *Rechtsg.* p. 1027.

of the jurists whose opinions and treatises¹ were incorporated and explained in the writings of the five above named, after the manuscripts containing them had been collated and their readings settled,² should have the force of legal authority, excepting, however, the notes of Ulpian and Paul to Papinian, which had been previously forbidden by Constantine and still continued to be invalid. In case of disagreement of the foregoing writers, a majority was to determine; when the opinions were equally divided, that of Papinian was to be preferred, but when he was silent the judge was to follow his own opinion. All these ordinances, however, were not of much avail; for instead of a fundamental examination of the various opinions, which previously was at least possible, the judge's duty was now in a great measure confined to the mere mechanical computation of votes.

Gregorian and Hermogenian Codes.

§ 63. The constitutions presented a similar though less difficulty. For from their large number and being published singly, it was difficult to possess or know them perfectly. Collections of them therefore were an urgent necessity. Two jurists, Gregorian and Hermogenian,³ endeavored to supply this by undertaking two collections (Codices) of imperial constitutions,⁴ which, however, mostly contained naught but rescripts.⁵ The Gregorian Code probably contained the imperial constitutions from Hadrian to Constantine; the Hermo-

¹ Formerly the ordinance was understood as only relating to the views of those jurists who referred to the five here mentioned, but erroneously, as is shown by *Puchta, supra*, note 2. See also *Sanio, supra*, note 2.

² The correctness of each passage of a work by any other author than one of the five herein mentioned must be established by a comparison with several copies of such work, otherwise such passage was disregarded. See *Sanio, supra*. *Puchta* is of contrary opinion, and believes that the ordinance in question only relates to the matter for which one of the five cites another writer, and remarks that the correctness of the citation must be established by comparison with the work cited.

³ That they were so named, and not Gregorius and Hermogenes, as many believe, appears from the *Consultatio veteris Icti* (§ 66, *infra*), wherein the "corpus Hermogeniani" is cited.

⁴ Similar collections were made by jurists at an earlier period. Thus Papirius Justus compiled the rescripts of the *Divi Fratres* (Wieling, *jurispr. rest.* p. 157). The grammarian Dositheus compiled the rescripts of Hadrian (Schulting, p. 855, and in *Dosithei magistri interpretamentorum liber tertius*, edited by *Böcking*, Bonn, 1832, p. 1). Ulpian in his work *de officio proconsulis* collected the penal rescripts (*Coll. XV. 2*), and especially those against the Christians (*Lactantius div. Inst. 5. 15*), and Julius Paulus made a collection of imperial decrees by Septimius Severus and Antoninus Caracalla, under the title *Imperialium Sententiarum in cognitionibus prolatarum libri VI.* (*Inscr. fr. 113. D. 35. 1*). The *Decretorum libri II.* is only another edition of this collection.

⁵ *Pohl*, *comm. de Cod. Gregor. et Hermog.*, Leipsic, 1777; *Bach*, *hist. jur. Lib. 3*, cap. 3, sect. 4; *Hugo*, *Rechtsg.* p. 1017; *Löhr*, *Uebersicht der Constitutionen 2d Progr.* p. 9; *Jacobson*, *Diss. critica de Cod. Gregoriano et Hermogeniano*, Königsberg, 1826; *Puchta*, *Instit.* § 135.

genian Code was probably only a supplement to the former, and contained principally constitutions of Diocletian and Maximian.¹ There are but few fragments left of these codes.²

Theodosian Code.

§ 64. The Theodosian Code was of greater importance than either of the foregoing codes.³ The emperor Theodosius the younger, by a commission of sixteen jurists, of whom the ex-consul and ex-præfectus prætorio Antiochus was the chief, caused a collection of imperial edicts to be made, in which, however, were included many rescripts. This collection was published in the year 438, as a code for the eastern empire.⁴ Theodosius sent this new code to his son-in-law Valentinian III., who confirmed it the same year for the western empire, and presented it to the senate at Rome, which received it with acclamation.⁵ This Theodosian Code contains the imperial constitutions since Constantine, which, when relating to different matters, were divided under different titles, and hence were very often dismembered. It consists of sixteen books, each of which is divided into titles. We have complete the latter part of the sixth book to the end of the work. The first of the fifth book and the beginning of the sixth have not been wholly recovered; we only possess them as extracts in the *Breviario Alariciano*. We are indebted to Jacob Gothofredus for a very good edition of the Theodosian Code, with an excellent commentary.⁶ It was not, however, published till after his death, which was by Anthony Marville at Lyons, in 1665, in six volumes, folio. This was afterwards revised, and published with various readings and many additions, by John Daniel Ritter, at Leipsic, 1736 to 1745, in six volumes, folio, the last of which was divided into two parts. A later edition of the Theodosian Code is to be found in the *jus civile Antejustinianum*, Berlin, 1815. Since that time several genuine constitutions of the first five books have been recovered,

¹ In the *Consultatio*, cap. 9, there are introduced seven constitutions of Valens and Valentinian, among which there are three rescripts to private persons, "ex corpore Hermogeniani." See *Puchta*, *supra*.

² They are to be found in *Schulting*, p. 683, and in the Berlin edition of the *Jus civile antejustinianum*, T. 1, p. 205. See *Haubold*, *Inst. lit.* p. 259. The fullest edition is (in which, however, are omitted the seven more recent constitutions mentioned in the preceding note, which he places in *Cod. Theod.*) *Hænel*, *Cod. Gregorini et Cod. Hermogen. fragmenta*, Bonn, 1835, and in *Corp. jur. Antejust. Fasc. II.*

³ It is certainly more correct to say Theodosianus Codex, Gregorianus et Hermogenianus Codex, than Codex Theodosianus, etc.

⁴ *Bach*, *supra*, lib. 3, c. 4; *Hugo*, *Rechtsg.* p. 1029; *Puchta*, § 136.

⁵ See the remarkable protocol of the senate of Rome respecting the reception of the Theodosian Code in the west, in the year 438, in *Clossius* (note 4, p. 45, *supra*), and in the *Corp. jur.* (*Fasc. II.* p. 82).

⁶ Respecting the first edition of the Theodosian Code by Tilius and Cujas, see *Haubold*, *inst. lit.* T. 1, p. 261, and his *institut. jur. rom.* § 218-220; *Hugo*, *ind. font.* (annexed to the *Pauli sent. rec.*), p. 162; *Spangenberg's Cujas*, p. 231-258; *Hænel. antiq. summar. Cod. Theod. etc.*, p. iii-xii.

part of them by Clossius in the Ambrosian Library at Milan, part of them by Amadeus Peyron and Charles Baudi de Vesme in palimpsests in the library at Turin, which discoveries have mostly been published.¹ The most recent and best edition of the whole collection, in which a careful use has been made of all these discoveries² and of many manuscripts, is that of G. Hänel, Bonn, 1837-1842, and which also forms a part of the *Corpus juris Antejustinian* (Fasc. II.-V.).

Later Constitutions of the Emperor Theodosius II. and his Successors.

§ 65. After the Theodosian Code had been completed, the emperors Theodosius II. and Valentinian III., as well as their successors, issued several new constitutions, which are therefore termed *Novellæ* (novels), that is, *novæ constitutiones*.³ They have been at a later period incorporated into the editions of the Theodosian Code, under the title of *Novellæ constitutiones Imperatorum. Justiniano anteriorum, Theodosii, Valentiniani, etc.*⁴

Juridical Writings of this Period, before Justinian.

§ 66. From the time of Severus Alexander till Justinian there were but very few juridical writers of importance. All the literary industry of this period was principally employed on collections of the imperial constitutions and on compilations of the writings of the older jurists. Only a few of these have been preserved besides the fragments of the Gregorian and Hermogenian Code, and the passages that have been incorporated into the Pandects from

¹ Those which were discovered by Clossius have been mentioned, *supra*, note 4, p. 45. Those which were discovered by Peyron have appeared, bearing the following title: *Codices Theodosiani fragmenta inedita ex codice palimpsesto bibl. reg. Taurinensis Athenæi, Amadeus Peyron*, Turin, 1824. See *Clossius*, *supra*, præf. p. vii. To the new discoveries of the Theodosian Code also belong: *Haubold*, *prætermisissorum imprimis ad breviarium Alaricianum, etc.*, and in his works edited by *Wenck*, Vol. 2, p. 897. A continuation of this, taken from Hänel's inedited papers, is contained in the preface of *Wenck & Stieber*, p. 84-168. The fragments discovered and published by Clossius and Peyron have been properly arranged and edited by *Puggé*, Bonn, 1825. A new revision of the first five books of the Theodosian Code, with the insertion of the constitutions found by Clossius, Peyron, and others, as we had them previous to the later discoveries, is contained in *Codices Theodosiani, libri V., etc.*, *Wenck*, Leipsic, 1825. About the year 1836 Vesme discovered in Turin other fragments of the manuscript, from which Peyron extracted; and by chemical means he was enabled to have a better and more perfect reading of the fragments which Peyron had used. A part of these discoveries is contained in small folios, printed at Turin, with the date 1839. Its third title is *Codex Theod. ex manuscriptis codicib., Car. Baudi a Vesme*.

² The labors of Vesme did not appear in Germany till the year 1844. They were published in sheets which have been appended to Fasc. VI. *Corp. jur. Antejus*.

³ *Hugo*, *Rechtsg.*, p. 1035; *Haubold*, *instit. lib.*, p. 265; *Puchta*, § 136.

⁴ They are found in *Gothofred's* edition at the beginning of the first volume, in *Ritter's* at the end of part second of the sixth volume. The most recent and most perfect edition is that of Hänel, Bonn, 1844, which is likewise in the *Corp. jur. Antejus*. Fasc. VI.

Hermogenian, Aurelius Arcadius Charisius, and Julius Aquila (§ 60, *supra*). Only the following juridical writings of unknown authors have descended to us :

1. The *Vaticana Fragmenta*, which were published by Ang. Mai in the year 1823 from a *codex rescriptus* in the Vatican Library. They contain fragments of law writings of the preceding period and of imperial constitutions, and appear to be the remains of a large law collection, which was probably made by an unknown jurist during the time between the Hermogenian and Theodosian Code.¹

2. The *Notitia dignitatum Orientis et Occidentis*. This is a kind of state calendar of the beginning of the fifth century, and contains a survey of all the territories of the Roman empire and a list of all the not-republican state officers therein.²

3. The *Mosaicarum et Romanarum legum collatio*, which probably was made about the end of the fourth or the beginning of the fifth century. It is mentioned in the middle ages under the title *Lex dei* or *Pariatio legum Mosaicarum et Romanarum*, or simply *Lex Romana*.

This work, which consists of sixteen titles, is substantially not more than a superficial collection of Mosaic and Roman law, intended to show that the latter was derived from the former. In this respect it is of but little value, but it also contains a great number of passages from the writings of Roman jurists and from the imperial constitutions, and on this account it is of some importance. It was first edited by Peter Pithou in 1573, from an extremely defective manuscript found in the Bibliotheca Mandubiorum at Lyons, the only one known to him ;³ but of late two other manuscripts have been discovered, one by Blume at Vercelli and the other by Lancizolle at Vienna,⁴ by the assistance of which Blume completed his new critical edition thereof.⁵

¹ A comparison of the Vat. Frag. § 3. 4. with fr. 7. D. 18. 3. and of § 13. with fr. 49. D. 19. 1. has given rise to the question whether it is not a fragment of the Hermogeniani juris epitomæ mentioned in note 8, § 60, *supra*. But this is impossible, because the order of the fragment is manifestly wholly different from the order of the edict, which, according to fr. 2. D. 1. 5, is, in the main, pursued in the *epitomæ*. The original edition of this fragment is by Angelo Majo, Romæ in coll. urb. ap. Burlesum, 1823, after which there were the following editions: Jourdan, Paris, 1823; Angelus Majo, Rome and Berlin, 1824. The latest editions are: Bethmann-Hollweg, Bonn, 1833, which latter has been incorporated into Corp. jur. Antejust. Fasc. I. p. 229. A new and much improved edition is by Mommsen, Abhandl. der Akademie der Wissenschaften, Berlin, 1859, Philolog. hist. section. Respecting this fragment, see Glück, Comm., Part 31, p. 169.

² Before Böcking this was supposed to be composed about the middle of the fifth century: Bach, histor. jur. lib. 3, c. 4. Respecting the various manuscripts, editions, and commentaries thereon, see Haubold, inst. T. 1, p. 279, but especially Böcking, on the notitia dignitatum, Bonn, 1834. The latest edition is Bonn, 1839.

³ Hugo, Rechtsg. p. 1093; Zimmern, Rechtsg. Vol. 1, p. 30. The Collatio is in Schulting, p. 719, and in the Berlin ed. Jur. civ. Antej. p. 1417. Respecting other editions and commentaries, see Haubold, p. 281.

⁴ Thémis T. 5, p. 119.

⁵ Lex Dei s. mosaicarum et romanarum legum collatio, Blume, Bonn, 1833.

4. The *Consultatio Veteris Icti de pactis*. This is a collection of legal opinions of an unknown jurist, and is probably not much later than the Theodosian Code.¹ The proofs for the correctness of the opinions delivered in this work are mostly literal quotations from the *sententiæ* of Paul and from the three *codices constitutionum* (§§ 63 and 64, *supra*), and thereby many passages of them have been preserved. Cujas, in 1577, first edited this collection.²

FURTHER VICISSITUDES OF THE ROMAN LAW.

I. IN THE OCCIDENT.

§ 67. All the collections of imperial constitutions made since the time of Constantine were only temporary reliefs of the necessities of the times. As early as the commencement of the sixth century, new collections were found necessary in the Orient as well as in the Occident. After the fall of the Roman empire, several new German states were formed in the Occident, in which the immigrated Germans and the conquered Romans lived together. The former had their own national laws and customs, which they retained in their new settlements, while the subjected Romans living among them continued to use the Roman law, and were judged according to it. This system of personal or national laws, which prevailed in the earlier part of the middle ages,³ soon rendered it necessary for the immigrated Germans to commit to writing the German national laws (*Leges Barbarorum*), and for the Romans subject to the Germans to commit their then prevailing law (*lex Romana*)⁴ likewise to writing. Thus, at this time, arose in the new German states of the empire two different codes of laws—German and Roman; at present we will only treat of the latter.⁵

Lex Romana of the Ostrogoths, Visigoths and Burgundians.

§ 68. The most important of the new Roman law books among the Germanic people are⁶—

Also in Corp. jur. Antejust. Fasc. I. p. 305. Subsequently the missing Pithou manuscript was found in the Royal Library at Berlin.

¹ Rudorff, Vol. 13, No. 2.

² Hugo, Rechtsg. p. 1093; Zimmern, Rechtsg. Vol. I. p. 31. The latest edition is that of Puggé, in Corp. jur. Antejust. Fasc. I. p. 391.

³ This was more developed in the later Frankish empire, where the Roman and several Germanic rights in this manner became applicable. Montesquieu, esprit des lois. Liv. 28, art. 2; Savigny, Geschichte des R. R. im Mittelalter, Vol. 1, chap. 3; Eichhorn, deutsche staats and Rechtsg. § 29; Waller, deutsche R. G. § 137–139.

⁴ The meaning of *Lex Romana*, at that time, was Roman law in general, or a code of Roman law: Savigny, Vol. 1, p. 105; 2d ed. § 37 and 38, p. 130, *seq.*

⁵ Respecting the German law books of this time, or the *Leges Barbarorum*, see § 98, *infra*.

⁶ Respecting the time in which these books were compiled see notes 1, 2, p. 52; Puchta, Inst. § 37.

A. The *Breviarium Alaricianum* among the Visigoths.¹ Alaric II., king of the Visigoths, published in the year 506 a code for the government of the Romans living in his empire, which had been collected by a commission, created by him, of Roman jurists, under the direction of his *comes palatii* Gojarich, out of the Gregorian, Hermogenian and Theodosian Codes, and out of the later novels (§ 65, *supra*), and out of some of the writings of Gaius, Paul and Papinian (§ 54, *supra*). Most of the passages are accompanied by a paraphrase (*interpretatio*) in bad Latin, but which was then understood.² This Visigothic compilation, since the sixteenth century, has been usually termed *Breviarium Alaricianum* or *Aniani* from Anian, the private referendary (secretary) of Alaric, who was commanded by the latter to authenticate, by his signature, the copies of the Breviary sent to the *comites*.³ In the middle ages it is commonly referred to under the titles *Corpus Theodosianum*, *Lex Theodosiana*, *Liber legum*, *Lex Romana*. We are indebted to this compilation for the preservation of many passages which otherwise would have been lost, especially the most of the yet remaining fragments of the Gregorian and Hermogenian Codes, the first five books of the Theodosian Code, and the *Sententiæ receptæ*⁴ of Paul.⁵

B. The edict of Theodoric, king of the Ostrogoths, which he issued in the

¹ *Biener*, historia legum Wisigoth. Leipsic, 1783, and in his works, ed. *F. A. Biener*, Vol. II. No. 2; *Savigny*, Gesch. des R. R. im Mittelalter, Vol. 1, cap. 5. II.; Vol. 2, cap. 8. I.; *Hugo*, Rechtsg. p. 1040; *Guizot*, cours d'histoire moderne, Paris, 1827, Vol. 1, and in the *Revue française*, 1828, N. VI. p. 202-244.

² See *Jac. Gothofredus* in prolog. Cod. Theod. cap. 6. Only to Gaius' Institutes such an *interpretatio* was not added, because these were entirely rewritten.

³ It is commonly said that Anian only attested the decree of publication; but, however, see the *commonitorium* and *Jac. Gothofredus*, *supra*, cap. 5. § 7. 8. who comments on it as follows: "Munire voluit Alaricus hujus Codicis exemplaria, ne scilicet variatio accideret, subscriptione Aniani viri spectabilis." This *Commonitorium* is in *Savigny*, Vol. 2, chap. 8.

⁴ See note 3, p. 37, *supra*. Respecting a short passage from Papinian, see note 1, p. 36, *supra*, and the present section under division C. Till the discovery of the genuine Institutes of Gaius we only had them as contained in *breviario Alariciano*. See note 6, p. 35, *supra*, where the editions of the Visigothic Gaius are mentioned.

⁵ Among the many manuscripts of the Breviary now extant the code formerly at Würzburg, but now in the library at Munich, of the sixth century, is the oldest, but is very defective. See thereon *Hufeland*, Nachricht von den jurist. Schätzen, Bamberg and Würzburg, 1805, and *Hugo*, Rechtsg. p. 1047. Respecting another very old manuscript of the seventh century, formerly belonging to Meermann, but now belonging to Philipps, of Middlehill, Bart., see *Witte*, de Guil. Malmesburiensis codice legis Romanæ Wisigothorum, Breslau, 1831. The only complete edition of the Breviary formerly was that of *John Sicking*, Basel, 1528. Respecting other manuscripts and editions, see *Haubold*, inst. lit. p. 223; *Savigny*, Vol. 2, chap. 8, at the end. Several theretofore unknown passages of the Breviary were discovered by *Hamel* in some codes at Paris and at Orleans, and were published by *Haubold*, under the title *Haubold, Prætermisorum imprimis ad breviar. Alar.* in his works, edited by *Sarber*, Vol. II. p. 897, and *Stieber*, in his pref. p. 84. There is now a new edi-

year 500, and which he intended not only for the conquered Romans, but also for the Ostrogoths. The matter in this edict is extracted entirely from the Roman law, and especially from the Theodosian Code, the later novels (§ 65, *supra*), and *Pauli sententiæ receptæ*, but these sources were used with such freedom and so arbitrarily that the Roman law can scarcely be traced in it.¹

C. Between the years 506 and 534, a *Lex Romana* was published for the Roman subjects in the Burgundian empire, and which is known by the title of *Papiani liber responsorum* or *Papiani responsum*.² The greater part of this collection is derived from the pure sources of the Roman law and part from the *Breviarium*. The title *Papiani responsum* was occasioned by an error which occurred in the middle ages, in the revision of manuscripts, in the following manner: Every complete copy of the *Breviarium Alaricianum* concludes with a short passage from *Papiniani liber responsorum*.³ In the manuscripts *Papianus* is usually written for *Papinianus*. Now, in one of the manuscripts there was a complete *Breviarium*, to which was appended the *Lex Romana Burgundionum*, without any designation of its being a new work. Some one who copied this appendix presumed that it was a continuation of the passage from Papianus, etc., commenced with that very passage of the Burgundian *Lex Romana*, and entitled the latter, in imitation of the manuscript, *Papiniani liber responsorum*. At a later period the

tion, under the title *Lex romana Visigothorum Ad LXXIII. libror. manuscriptor.*, *Hænel*, Leipsic—the first edition after *Sichard's*, Berlin, 1847–1849.

¹ It was first issued by P. Pithæus as an appendix to his edition of his work of Cassiodorus (Paris, 1579), and it is appended to most of the modern editions of this work, and may also be found in the collections of *Lindenberg*, *Georgisch*, *Canciani* and *Walter* (see note 5, § 88, *infra*), and in *Savigny*, Vol. 1, chap. 1, end; Vol. 2, chap. 11; *Hugo*, *Rechtsg.* p. 1039; *Glöden*, *das röm. Recht im ostgoth. Reiche*, Jena, 1843. *Glöden* states that the so-termed *Breviarium* was used in the *Edictum*, and that the latter could not have been already published in the year 500, as was formerly supposed, but must have been published since the year 506; but this is doubted.

² It is to be found in *Schulting*, p. 827, and in the Berlin edition of the *Jus civile Antej.* Vol. 2, p. 1501. See *Savigny*, Vol. 2, chap. 7. II.; *Haubold*, *supra*, p. 287, and in his *inst. hist. dogm.* § 262; *Hugo*, *Rechtsg.* p. 1049. The best and most complete edition of it, at present, is *Lex Romana Burgundionum ex jure Romano et Germanico illustravit, Barkow*, Greifswalde, 1826, for which, also, the fragment discovered by *Mai* in a Vatican palimpsest (*Fragmenta Vaticana*, Berlin, p. 104) was first used. The view that has been hitherto entertained that this collection could not have been published previous to the year 517 originated from the assumption that the second preface to the *Lex Burgundionum*, wherein this is attributed to *Lex Romana*, emanated from King Sigismund, whose reign began in the year 517. But, according to modern Germanians, that second preface was the first constitution of King Gundobald, who died in the year 515, and the law book in which this is contained was published by the same Gundobald. *Gaupp*, *das alte Gesetz der Thüringer*, Breslau, 1834, p. 8.

³ See note 1, p. 36, *supra*.

first error may have been discovered without the second having been observed. However, there is a manuscript of the ninth century, in which, over the true *Lex Romana Burgundionum*, there stand twice the words *Incipit Papianus liber I. Responsorum*, and at the end the words *Explic. Lib. Papianus feliciter*.¹ This error was continued in the first printed editions,² which Cujas edited in the years 1566 and 1586. In the first edition, but not in the second, there was the further error that the book does not commence with the passage from which the incorrect title arose.

II. IN THE ORIENT—Justinian.

§ 69. After the time of Theodosius naught was done in the East to facilitate the administration and study of the law till the year 527, when Justinian assumed the government.³ This emperor during the thirty-eight years of his government directed his attention principally to legislation and the promotion of the study of the law, and he was so fortunate as to find men who possessed the knowledge and abilities necessary for realizing his plans.⁴ Under him those new law books were made⁵ which continue in legal force even at the present day, and whose importance therefore requires that we should treat of them more at large.⁶

JUSTINIAN'S LAW COLLECTIONS.

1. *The Old Code.*

§ 70. Justinian first undertook a new collection of the imperial constitutions, which was intended as a substitute for the previous collections. His

¹ It has been placed recently in the Royal Library at Berlin.

² *Savigny, supra*, already remarked concerning this false designation, and as he then did not know of the above-mentioned erroneous manuscript, he presumed that the error was committed by Cujas, in the manner above specified.

³ Respecting Justinian's life and character see *Ludewig, vita Justiniani*, Halle, 1731, and the older authors mentioned in *Haubold, inst. jur. Rom. hist. dogm. ed. Otto*, § 265, especially *Bach, hist. jur. lib. 4. c. 1. sect. 1*; *Gibbon, hist. chap. 40-47*.

⁴ The most distinguished of them are Tribonian, Theophilus, Dorotheus, Cratinus, Thalelaeus, Stephanus, Anatolius, etc. See *Const. Tanta*, C. 1. 17. § 9, and *Bach, supra*, sect. 3. § 4-21.

⁵ The history of his collection is related by Justinian himself in the constitutions by which they were confirmed and published. Such constitutions are usually cited by their initial words, as, for instance, in the preceding note, the *Const. Tanta*. They are placed in the front of each collection to which they relate and are partly placed together in the Code 1. 17.

⁶ Respecting their origin, spirit and character see the older authors cited in *Haubold, supra*, §§ 266. 301, and especially *Bach, supra*, sect. 2. § 3; *Spangenberg, Einleitung in das röm. Justin. Rechtsbuch*, pp. 16. 148; *Hufeland, Geist des römischen Rechts* Pt. 1. T. 1. No. 14-17; *Savigny, Vol. 1, p. 12-15*, 2d ed. 34-37. An excellent sketch of the origin, design, contents and method of Justinian's law books is given by *Clossius, Hermeneutik des Röm. Rechts*, Riga and Dorpat, 1829, p. 105.

intention was that all that was useful should be selected out of the older collections and out of the later constitutions, which should be abridged as much as possible; to omit all obsolete matter, to make such alterations as the times required, and to arrange the whole according to their matter under proper titles. For this purpose in the year 528 he appointed a commission of ten jurists with very extensive powers, at the head of which was the *ex-questor sacri palatii* Johannes, and in which was the subsequently distinguished Tribonian.¹ The commission completed their labors in fourteen months. This new code, which consisted of twelve books, Justinian confirmed by a special ordinance, and at the same time also prohibited the use of the older collections of rescripts and edicts.² This first code of Justinian, which is now termed *codex vetus*, is lost.³

2. The Pandects.⁴

a. Commission to form them.

§ 71. After the above-mentioned code was completed Justinian in the year 530 commissioned Tribonian, who was now invested with the dignity of *questoris sacri palatii*, and sixteen other jurists⁵ to select all that was useful from the writings of the most authoritative of the older jurists and to arrange them according to their matter under proper titles. The commissioners for this compilation also had very extensive powers.⁶ In regard to the writings from which they should extract they were not bound by the Theodosian-Valentinian law of citation (§ 62, *supra*),⁷ and were not confined to the letter of the writings extracted, but had the right according to their discretion to abbreviate, to add, and generally to make alterations adapted to the times, and they were further ordered to remove all the contradictions between the old jurists, to avoid all repetitions and to omit all that had become obsolete.⁸ The consequence of this was that the extracts were not absolutely true, but were frequently interpolated and amended in conformity with the law prevailing at Justinian's time. Alterations, modifications and additions of this kind are usually termed *emblemata Triboniani*.⁹

¹ Const. *Haec. quæ necessario de novo Codice faciendo*, Dat. Idib. Febr. 528.

² Const. *Summa reipublicæ* de Just. Cod. confirm. Dat. 7. Id. April. 529.

³ Justinian himself terms it Justinianus Codex in the Const. *Cordi nobis de emendat. Cod.* § 5; *Haubold*, inst. jur. Rom. hist. dogm. § 223; *Hugo*, Rechtsg.

⁴ *Spangenberg*, Einleitung, p. 23-57.

⁵ Their names are given by Justinian in the Const. *Tanta*, § 9, and Const. *Dedit*, § 9, C. 1. 17.

⁶ Const. *Deo auctore* de conceptione Digestor. ad Tribonianum, Dat. 18. Cal. Januar. 530. They are also in Const. 1. C. 1. 17.

⁷ Respecting the influence of the citation law on the Digest, see *Hugo*, civ. mag. Vol. 6, p. 176.

⁸ Const. *Deo auctore*, § 4-9; *Haubold*, *supra*, § 224; *Hugo*, Rechtsg. p. 1055.

⁹ *Wissenbach*, emblemata Triboniani, Halle, 1736; *Meister*, emblemata Triboniani, Göttingen, 1745.

b. *Manner of Compilation.*

§ 72. Justinian's commissioners completed this extensive work in three years.¹ Within this short space of time they had extracted from the writings of no less than thirty-nine jurists.² It may be regarded as a consequence of this haste, that many opinions of the older jurists were not derived directly from their own writings, but indirectly from the works of others where they were cited, and hence many passages were severed from their original contexts and misplaced with other connections, by which many errors crept into this compilation.³ Every extract, which generally consists of a *principium* (beginning) and one or more paragraphs,⁴ had an inscription (*inscriptio*) which contained the name of the writer and of the work from which it was or should have been extracted.⁵ The whole compilation, consisting of fifty books, was entitled *Digesta sive Pandectæ juris enucleati ex omni vetere jure collecti*. This work was particularly adapted to practice, and this explains why the arrangement of the several matters follows as closely as possible the order of the edict, for they who were familiar with the edict would have no difficulty in using the Pandects.⁶ In the arrangement of the several fragments which

¹ Justinian himself terms the work an *opus desperatum* (see Proëm. Inst. § 2), and thinks that it can scarcely be hoped to be completed in ten years. Const. *Tanta*, § 12. C. 1. 17. He often mentions the "immensa veteris prudentiæ volumina." Nearly two thousand treatises were introduced into one compilation of fifty books, and it has been carefully recorded that 3,000,000 of lines were reduced in this abridgment to 150,000. Const. *Tanta*, § 1.

² Justinian desired that an account should be given of them and of the writings extracted from, to be published in advance of the Pandects. Const. *Tanta*, 2. § 20. C. 1. 17; Const. *Dedit* 3. § 20. C. 1. 17. It is doubtful whether this was done. However, the Florentine manuscript of the Pandects contains such an account in the Greek language (*Index Florentinus*), which is copied into the Göttingen and Beck's edition of the Corpus Juris; but it contains several errors and its authenticity is disputed. See *Eckhard*, *Hermen. jur. ed. by Walch*, p. 369; *Spangenberg*, *Einführung*, p. 24, seq. Respecting a more precise account, see note 8, p. 94.

³ *Dirksen*, *Civil. Abhandlung*, No. 3.

⁴ The single passages are usually termed *leges* (*Buchholz*, *Jur. Abh.* p. 371), although they are naught else than extracts or fragments from the writings of jurists. This name applies to them only because by their insertion into the Pandects they received the character of laws to the extent that their contents permitted. But though the term *leges* is still much used, it is more correct to term them *fragments*. See *Hugo*, *Beitr. zur Bücherkenntnis*, Vol. 2, p. 162.

⁵ See *Eckhard*, *supra*, p. 359; *Thibaut*, *Logischen Auslegung*, 2d ed. p. 167. On the older writings, see *Haubold*, *Inst. jur. Rom. hist. dogm.* § 227.

⁶ From *digerere in partes*, because Justinian divided the whole collection into seven parts. *Hugo*, *Civil. Mag.*, Vol. 6, p. 148.

⁷ From *Har* and *Hexonai*, because all that was useful was to be inserted therein. The collection was intended to form a general repertory for the *jus civile*, as the code is for the constitutions. *Hugo*, *Rechtsg.* p. 1078.

⁸ It is apparent that a larger part of the Pandects was taken from the commentaries on the edict. Justinian himself says in the Const. *Deo auctore*, § 5. C. 1. 17, that the Pandects should be composed "*ad Edicti imitationem*." See *Bensley*, *De fun-*

formed a title, not so much attention was paid to their contents as there was paid to placing together the extracts from the same work.¹ But in the succession of the several excerpted works there is a certain regularity which was first discovered and shown in our day.² The extracts collectively are divisible, according to the writings from which they were taken, into three masses.³ Those which are inserted in one title out of one of these masses generally stand together. The order in which the several writings belonging to one mass follow each other is the same in all the titles.⁴ But of the three masses that generally form the beginning of every separate title which has contributed most to it,⁵ as also of the two appendices to the other masses, the larger *genui digestorum ordinis*, Göttingen, 1825; *Böcking*, Institutionen, Vol. 1, p. 68; *Eyssenhardt*, Justinian's Digesten, Leipzig, 1845, p. 53.

¹ But a work *ad edictum* would in this relation be treated as two works. See note 3.

² *Blume*, on the order of the fragments in the titles of the Pandects, in the *Zeitschr. für geschichtl. R. W.* Vol. 4, p. 257. See thereon *Hugo*, *Rechtsg.* p. 1066; *Reimarus*, über die Inscriptionsreihen der Pandekten Fragmente, Göttingen, 1830; *Eyssenhardt*, *supra*. The correctness of Blume's discovery and its expected benefits is denied by *Tigerström*, *de ordine et historia Digestorum*, Berlin, 1829.

³ The largest thereof, at least that from which a greater number of extracts was taken than from both of the others, comprised, in addition to two-thirds of the commentary on the edict, the most of the other non-casuistical writings. But the most voluminous element thereof was the works *ad Sabinum*, wherefore it was termed the Sabinian mass. Somewhat smaller was that which consisted chiefly of the two other third parts of the commentary on the edict, and was therefore termed the edict's mass. The smallest of the three masses contained chiefly casuistical writings, at the head of which was Papinian's, and was therefore termed the Papinian mass (of the Appendix mass, see note 4). The order of juridical study observed before the publication of the Pandects appears to have influenced this division; of this we only mention that in the first year after Gaius' Institutes some of the middle books *ad edictum* were read, that the students were called *Edictales* in the second year, and in the third year, *Papinianistæ*. We must remember that the *libri juris civilis* of Massurius Sabinus probably formerly served the same purpose for instruction for which at a later period Gaius' Institutes were used, which, like the Institutes generally, were included in the first of the above masses. It will also be seen that the important writings assigned to a mass, in view of the chief objects of its contents, were nearly homogeneous. In this relation the middle books of the commentary on the edict attached themselves to the works *ad Sabinum*. The less important writings, however, were distributed at discretion among the three masses.

⁴ According to *Blume*, there is a striking exception in the Papinian mass, because it contains a certain number of heterogeneous writings, to which, *e. g.*, the Digesta of Cervidius Scævola belong, which sometimes form the beginning, but more frequently the end, wherefore Hugo regards them as a fourth mass. However, these writings never commence a title. They received their appointed position, as was already presumed by Blume, because they came into the hands of the compilers too late to be properly distributed among the different masses. Hugo terms them Appendix mass, and they are also termed post-Papinian mass.

⁵ Hence a distinction is made between Sabinian title, Edict title and Papinian

erally precedes the smaller, that is, the smaller mass is at the end. However, all the titles do not contain fragments of all of the masses, but only the larger ones, and in some of the latter the three masses follow each other several times. The foregoing rule respecting the position of the several fragments has many exceptions. Respecting the causes which produced the foregoing consequences we are wholly without information. At present there exist three different hypotheses. According to the first,¹ the commission was divided into three classes; to each of them was given one of the masses for excerption, afterwards the three classes met together for the purpose of connecting the titles of the extracts which each had prepared after omitting the superfluous matter. According to the second hypothesis,² each one of the three masses was wholly extracted and such extracts were inserted into the several titles before proceeding to another title, so that therefore a title consisted regularly of three courses of insertions made at different times, of which the latter was sometimes inserted before either of the earlier ones. According to the third hypothesis,³ the several works to be extracted were divided among the several members of the commission, and afterwards out of all the matter extracted for any title a selection was made, and out of the selection the title was to be composed (which, perhaps, was not done by the entire commission); after this the rule was followed that in each title the one and the same mass always held the same position in relation to the other masses,⁴ and the works that formed one mass always had the same continuous succession.

c. *Publication of the Pandects.*

§ 73. The Pandects were published by Justinian on the 16th of December, 529, but they were not to have legal authority till the 30th of that month.⁵ When he confirmed the Pandects, he at the same time forbade the further use of the writings of the older jurists, in order to prevent jurisprudence from again becoming so diffuse, wavering and uncertain as it had been; he prohibited the writing of commentaries on the new compilation, and only per-

title. There is no fourth title, notwithstanding one may agree with Hugo that there are four masses.

¹ By *Blume*.

² By *Hugo*. See, *s. g.*, his *Rechtsg.*, *supra*.

³ By *Puchta*, *Instit.* § 139. See *Thibaut*, *Hermeneutik und Kritik des R. R.* § 80, end.

⁴ According to this, as also according to the second hypothesis, the Sabinian mass was first inserted, then afterwards the Edict mass, etc.

⁵ For this purpose Justinian published two separate constitutions—one in Latin and the other in Greek—but, according to their actual contents, they were alike. The Latin is the *Const. Tanta*, 2. C. 1. 17. The Greek is the *Const. Δέδοται* s. *Dedit*, 3. C. 1. 17. Besides this, he prescribed by the *Const. Omnem reipublicæ*, ad *Antecessores*, a plan of study in which he defined what shall be the manner of lecturing on the Pandects and other law books in the law schools. See *Hugo*, *Rechtsg.* p. 1064; *Zimmern*, *Rechtsg.* § 70.

mitted at most the making of literal translations into Greek (*versiones nuda πῶδα*) and the publication of parallel passages, with a summary of the several titles (*παράτιτλα*).¹

Division of the Pandects, and Manner of Citing them.

§ 74. Justinian himself divided the fifty books of the Pandects into seven parts (*partes*), probably because the edict was divided into so many *partes*. The first part began with the first book, the second with the fifth book, the third with the twelfth, the fourth with the twentieth, the fifth with the twenty-eighth, the sixth with the thirty-seventh, and the seventh began with the forty-fifth book.²

The manner of citing a passage in the Pandects always has been and still continues to be various.³ Formerly it was usual to cite thus :

D. de jure dotium L. profectitia § si pater,⁴

or reversed :

L. profectitia § si pater D. de jure dotium.

From this subsequently arose :

L. profectitia 5. § si pater 6. D. de jure dotium.

And lastly :

L. 5. § 6. D. de jure dotium.

This latest form is that most commonly used at present, except that many more accurately prefer fr. instead of L. (§ 72, note 4, *supra*), and add to the end, in a parenthesis, the number of the book and of the title, as thus :

fr. 5. § 6. D. de jure dotium (23. 3.).

If the *principium* of a fragment be referred to, then, instead of the mark and number of the section, thus :

fr. 5. pr. D. de jure dotium (23. 3.).

But at present⁵ many cite only by numbers, thus :

fr. 5. § 6. D. 23. 3,

or reversed :

D. 23. 3. fr. 5. § 6, or simply D. 23. 3. 5. 6.

As to the 30th, 31st and 32d books of the Pandects, it should be remarked that they are not divided into particular titles, but consist only of fragments,

¹ Const. *Tanta*, § 21, Const. *Dedit*, § 21.

² Const. *Tanta*, § 2, *seq.* C. 1. 17; Böcking, *Inst.* pp. 68 and 69. Especial mention is made of this division of the digest into seven *partes* in *Hugo's Lehrbuche der Digesten*, Berlin, 1828, 2d ed.; *Eysenhardt, supra*.

³ See *Thibaut*, *Civ. Abb.* No. 10; *Hugo*, *Encyclopædia*, 7th ed. p. 219.

⁴ Thus cites the *Glossa*: D. signifies Digestum, as do also the letters ff. See *Thémis* Tom. 5, p. 47. 115. Instead of D. or ff., P. or π is also used, both of which then signify *Pandectæ*.

⁵ Citing simply by figures was already used in *Bröderodii, repertorium sententiarum*, Frankfort, 1664.

and form a treatise of their own *de legatis et fideicommissis*, which is divided into three parts, thus :

Dig. lib. 30 comprises lib. 1. de legatis.

Dig. lib. 31 comprises lib. 2. de legatis.

Dig. lib. 32 comprises lib. 3. de legatis.

They are distinguished, by citation, thus:

fr. 108. § 3. D. de legatis I. or D. 30.

fr. 76. § 1. D. de legatis II. or D. 31.

fr. 36. D. de legatis III. or D. 32.

3. *The Fifty Decisions.*

§ 75. In the compilation of the Pandects, controversies in the writings of the jurists were naturally very frequently met. But as the Theodosian-Valentinian law of citation was abolished, and as it no longer depended on the majority of opinions, nor on that either of the older jurists should be entitled to the casting vote, naught was left for the compilers, when they did not venture to determine a disputed question themselves, than that Justinian should determine such controversies by special decisions. In fact, Justinian had already given thirty-four such decisions before December 15, 530, when the Pandects were begun,¹ and during their completion the number rose to fifty. These decisions were at first collected separately,² and were afterwards embodied in the new code (§ 78, *infra*).³ Whether they are all contained in the code, and how they are to be known, is very doubtful. The following are said to be the *criteria* by which they may be distinguished :

1. They bear the inscription *Justinianus Juliano*, or *Joanni P.P.*

2. Their subscription is, *Lampadio et Oreste coss. 530 or 531, or anno primo vel secundo post consul. Lampadii et Orestis.*

3. They contain the decision of a controversy⁴ between the older jurists.⁵

4. *The Institutes.*⁶

§ 76. While the Pandects were being compiled it must have been apparent from their great extent that they would be ill adapted to beginners in the study of jurisprudence. The first instruction in the Roman law was hitherto given in the Institutes of Gaius, which was the law prevailing in the

¹ Schröder, Civ. Abh. p. 241; Hugo, Rechtsg. p. 1083.

² See § ult. I. 1. 5. Theophil. ad h. l.; § 16. I. 4. 1; C. un. C. 6. 51, and especially the Turin gloss to § 2. I. 3. 1. "sicut libro L. constitutionum invenies;" Savigny, Gesch. des Röm. Recht. im M. A., Vol. 2, 2d ed. p. 452, No. 241.

³ Const. *Cordi nobis* de emendat. Cod. Just. § 1. According to Biener, Gesch. der Novellen, p. 9, Justinian originally intended merely to give such decisions on the writings of the classical jurists. But see Puchta, Instit. § 139.

⁴ But see also § ult. Inst. 1. 5.

⁵ Thus, Const. 12. 13. C. 3. 33; Const. 10. C. 6. 26; Const. 3. C. 6. 29; Const. 31. C. 6. 42; Const. 19. C. 6. 50. See Höpfner, Comm. § 7; Schweppé, Rechtsg. § 125; Zimmermann, Rechtsg. Vol. 1, § 49.

⁶ Spangenberg, Einl. p. 58-62.

second century after the Christian era. In the nomination of a commission for the compilation of the digest,¹ Justinian indicated that he intended to make a change; and while they were engaged on the digest, Justinian commanded Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law, under the title of *Institutes*, which should contain the rudiments of jurisprudence;² and regard was to be paid to the old law by historical introductions, but the practical was to be their chief object.³ This work was founded on the *Institutes* of Gaius (note 6, p. 35, *supra*), so that Justinian's *Institutes* are in fact naught more than a new edition of that work, which up to that time had been used as a primary book for the study of the Roman law, but which, to a certain degree, became inapplicable at Justinian's time. In this new edition of Gaius' *Institutes* the wholly obsolete was omitted; on the other hand, the new constitutions of Justinian, as far as they were then issued, were referred to. Justinian's *Institutes* were published on the 21st day of November, 533, and they obtained the force of law at the same time with the *Pandects*, on December 30, 533.⁴ Theophilus, one of the co-editors, delivered lectures on the *Institutes* in the Greek language; and from these lectures originated, prior to the publication of the new code, the very valuable commentaries known under the Latin title, *Theophili antecessoris paraphrasis græca institutionum Cæsarearum*.⁵

Division of the Institutes.

§ 77. The *Institutes* consist of four books, each of which contains several titles;⁶ each title commences with a *principium*, followed by the single par-

¹ Const. *Deo auctore*, § 11. l. C. l. 17.

² *Præmium Inst.* § 4: "Ut sint totius legitimæ scientiæ prima elementa;" Const. *Deo auctore de conc. Dig.* § 11: "Ut rudis animus studiosi simplicibus enutritus facilius ad altioris prudentiæ redigatur scientiam." See also § 2. l. 1. 1. Respecting the arrangement of the matter in the *Institutes*, see § 126, *infra*.

³ *Præm. Inst.* § 3, *infin.*; *Hugo*, *Rechtsg.* p. 1079.

⁴ Const. *Tanta* and Const. *Dedit*, § 11. *Præmium Institutionum*. The latter is a constitution wherein Justinian states the object and contents of the *Institutes* and wherein he confirms them.

⁵ Respecting this, see *Degen*, *Bemerkungen über das zeitalter, etc., des Theophilus*, Luneburg, 1809; *Hugo*, *Rechtsg.* p. 1097; *Zimmern*, *Rechtsg.* § 108. *Viglius von Zuichern* first published this paraphrase in the original, Basel, 1534, and Jacob Curtius translated it into Latin. *Fabrot*, by the aid of manuscripts, improved it and published it, with Curtius' emended translations, in Paris, 1638 and 1657. The best and most complete edition, with various readings, notes, and a new excellent Latin translation, was published by *Reitz*, Hague, 1751, in two volumes. See *Spangenberg*, *Einl.* p. 587. The Greek text, according to *Reitz*, was published by Rhallis in Athens, 1836. It has been translated into German by *Finke*, Göttingen, 1805, 1809, and with valuable notes by *Wüstemann*, Berlin, 1823.

A fragment of an indifferent edition of the paraphrase of Theophilus has been published under the title of *Fragmentum græcum de obligationum, etc.*: *Haubold*, Leipsic, 1817, and in his works edited by *Wenck* and *Stieber*, Vol. II. p. 347.

⁶ The whole number of the titles of the *Institutes* is 98. The usual editions con-

agraphs. Formerly the Institutes were cited by the rubric of the title and the initial word of the paragraphs, thus, § *fratris vero J. de nuptiis*. Now it is usual to cite the number of the paragraph and the rubric of the title, thus, § 3. J. de nuptiis; or simply the numbers, thus, § 3. J. 1. 10; or by joining the number with the rubric, thus, § 3. J. de nuptiis (1. 10). In referring to the *principium* of a title the abbreviation pr. is used, thus, pr. J. de nuptiis (1. 10).

5. The New Code.¹

§ 78. After the publication of the Pandects and the Institutes Justinian caused a revision of the code, published in the year 529 (§ 70, *supra*). This became necessary because Justinian had issued since then a number of new constitutions, and especially the fifty decisions (§ 75, *supra*) whereby the law of the Pandects was revised, changed, and more particularly defined.² He therefore, in the year 534, ordered Tribonian, with the assistance of the jurists Dorotheus, Menna, Constantinus, and Johannes, to revise the old code, and especially to add the new constitutions. This revision was completed in the same year, and the new edition of the code (*repetita praelectio*) was confirmed by Justinian on the repeal of the old code on November 16, 534.³

Its Contents and Divisions.

§ 79. This revised code contains only imperial constitutions, which from the time of Hadrian to that of Constantine consist mostly of only rescripts, but from Constantine chiefly of edicts or new general laws.⁴ The code consists of twelve books, which are subdivided into titles, and in these the single constitutions relating to the same subject-matter are arranged chronologically, but frequently only in fragments. The name of the emperor who issued it and of the person to whom it was addressed are generally at the head of each constitution, and at the end thereof the date. There are, however, many constitutions without date and consul (*sine die et consule*). The arrangement of the matter is generally the same as that of the Pandects; yet there are in the first and in the last three books many matters which are not contained in the Pandects;⁵ but on the other hand many constitutions which were in the older code, and to which the institutes still refer, have been omitted in consequence

tain 99, which error arises because a table of descents, which should be placed immediately after § 9, title 6, of the third book, is usually omitted, and the passage *de servili cognatione* is made to form the beginning of a new title, when, according to Theophilus and to the best manuscripts, it belongs to the sixth title: *Hugo*, Röm. R. since Justinian, 3d ed. p. 90.

¹ *Spangenberg*, Einl. p. 63-71.

² See *Löhr*, Mag. für R. W. Vol. 3, p. 186.

³ Const. *Cordi nobis* de emend. Cod. Just. § 2. 3; *Haubold*, § 241; *Hugo*, Rechtsg. p. 1083.

⁴ *Löhr*, Uebersicht 2d Programme, p. 13.

⁵ Namely many genuine constitutions. The *leges restitutæ* are all *sine die et consule*.

of being overlooked.¹ Many constitutions which were originally in the revised code were lost by the negligence of the transcribers. And first in the sixteenth century they were partially restored, principally by Augustine, Charondas, Cujas and Contius, partly from the Basilica (§ 84, *infra*) and partly from the Acts of the Council of Ephesus and other ecclesiastical sources, hence they are termed *leges sive constitutiones restitutæ*.² The code is cited like the Pandects, so that usually here every single passage is termed a *lex*; thus L. 22. C. mandati vel contra. However it is more correct to say const. (*constitutio*) instead of L.,³ and either to cite simply thus, const. 22. C. 4. 35, or to mention the title and the number of the book and of the title, thus, const. 22. C. mandati vel contra (4. 35).⁴

6. The Novels.

§ 80. In addition to the constitutions inserted in the *Codex repetitæ prælectionis*, Justinian during the long continuance of his government after the publication of that code in the years 535 to 565⁵ issued at different times a number of new constitutions, whereby frequently entire doctrines of the law were changed. The greater part of these new constitutions was written in Greek, but partly also in Latin, and some only in Latin, in obscure and pompous language, and published under the name of *νεαπαὶ διαταγαί*, i. e., *Novellæ Constitutiones*.⁶ It is doubtful whether Justinian himself really undertook an especial collection of them as he had intended;⁷ but it is certain that no official collection was ever published by him.⁸ Soon after his death a collection of 168 Greek novels was made,⁹ of which however four only are dupli-

¹ Hugo, Rechtsg. p. 1086, and his Lehrb. der Digesten und des Constitutionen Codex, 2d ed., Berlin, 828, p. 134-176; Oberg, de ordine, quo Constitutionum codex, etc., Göttingen, 1831; Böcking, Institut. § 21. pp. 70 and 71.

² E. g. § 11. I. 2. 10; § 7. I. 3. 2; pr. I. 3. 7; § 3. I. 3. 8; pr. I. 3. 10; Schaumburg, de constitutionibus Imperatorum antiquis, etc., Lemgo, 1755.

³ E. g. Const. 24. C. 4. 35; Const. 46. C. 1. 3; Haubold, *supra*, § 247. A list of these is given in Spangenberg, Einl. p. 169-173. See especially Wille, die leges restitutæ des Justin. Codex, Breslau, 1830. Contributions by Biener and Heimbach to the Zeitschr. für gesch. R. W. for the revision of the Justinian Code have been republished with additions and corrections in Berlin, 1833.

⁴ Justinian himself so terms them in the Const.: *Hæc quæ necessario*, § 2. Const. *Summa reipubl.* and Const. *Cordi nobis pr.*

⁵ Especially in the first five years.

⁶ Spangenberg, Einl. p. 72-86, and especially Biener, Geschichte der Novellen Justinian's, Berlin, 1824; Haubold, *supra*, § 249.

⁷ Const. *Cordi de emend. Cod.* § 4; Novel 25. epilog; Novel 26. c. 5. § 1.

⁸ Biener, *supra*, p. 38-51. The testimony of the patriarch Johannes Scholasticus, who soon after Justinian's death designates the novels as *συντάγματα* occurring ordinances, is decisive. Heimbach, *Avenbora*, T. II. p. 208.

⁹ See Biener, p. 85, *seq.*, who fixes the origin of this collection in the time of Tiberius, 578-582. And Heimbach, de origine et fati corporis quod 168 novellis constitutionib. constat., Leipsic, 1844.

cates; seven are ordinances of Justin II. and Tiberius II., and four are edicts of *præfecti prætorio*. Afterwards the glossators formed a collection of the novels into nine parts; in which, however, they only embodied ninety-seven novels, because they only considered these as applicable.¹ Every part contains several titles, each of which consists of a single novel, with the exception of the eighth novel, which is divided into two titles and forms the second and third titles of the second part. This explains how the ninety-seven volumes contained in this collection form ninety-eight titles. The novels not included in this collection were therefore also termed *extravagantes* or *extraordinariæ*. The later collections contain² all the 168 novels, but in such a manner that the glossed are mixed with the unglossed, wherefore the numbers and order of the novels in the glossed vary considerably from the unglossed editions.³

Epitome Juliani and Versio vulgata Novellarum.

§ 81. Soon after Justinian's death, or perhaps during his government, Julian, antecessor at Constantinople, composed a copious Latin extract from 125 novels, which is known under the title of *Epitome Novellarum* or *Liber Novellarum*, and which afterwards acquired great authority, especially in the Occident.⁴ Shortly after Justinian's death there appeared a collection of 134 complete novels, which contained those which were originally written in Latin, and a literal Latin translation of those which were written only in Greek.⁵ It was subsequently termed by the glossators the *Corpus Authenticum*,⁶ to distinguish it from the *Epitome Juliani*. It is the same after which the glossators divided the novels which they deemed valid into nine parts, and which is now termed the *versio vulgata*.⁷

¹ Savigny, *Gesch. Röm. Recht. im Mittelalter*, Vol. 3, end of chap. 22; Biener, p. 262, 271; Spangenberg, p. 129. See also note 5, p. 82, *infra*, where these ninety-seven glossed novels are noticed.

² See *infra*, § 113.

³ Besides these 168 novels the *Corpus Juris* contains thirteen edicts of Justinian, and three of these are contained in the former. They are in fact novels, but they only contain local provisions for single cities or provinces, and are at present entirely disregarded. Kind, *Diss. I. II. de XIII. Justiniani edictis*, Leipsic, 1793, 1801; Biener, *supra*, p. 85.

⁴ Hugo, *Rechtsg.* p. 1101; Biener, p. 70, 232, 289; Zimmern, *Rechtsg.* § 49, § 110. This epitome was first published by Bærius at Lyons, 1512; then by Miræus, 1561; then by Augustinus, 1566; and the best edition is by Pithæus, Basle, 1576, fol. This was reprinted, with some amendments, in *Petr. et Franc. Pithei, observat. ad Codicem*, Paris, 1689, p. 403. The epitome is likewise reprinted from a good manuscript in Scannellon's edition of the *Corpus Juris*, Lyons, 1549, 1550. See note 4, p. 91, *infra*. A German translation appeared at Frankfort, 1565. See Savigny, *Röm. R. im Mittelalter*, Vol. 2, 2d ed: p. xii.

⁵ Spangenberg, *Einleit.* p. 145; Biener, *supra*, p. 243.

⁶ Hence the name *Authenticæ* by which the glossators designated the complete Latin novels, in contradistinction from the *Novellæ Juliani*: Savigny, Vol. 3, cap. 22. iv.

⁷ They are those which are found in the usual editions of the *Corpus Juris Civilis*.

Manner of Citing the Novels.

§ 82. According to the old manner of citing the several novels which were used by the glossators, and which continued to be followed for a long time after, the designation "*Auth.*" was prefixed, by which the glossators designated the complete novels (§ 81, *infra*, note 6); then the rubric of the title in which the novel was contained in the glossator's collection; after this the initial words of the paragraph by which the chapter of the novel was meant, and finally, the number of the collation, and generally of the title, thus:

Auth. de hered. ab intest. § Si quis, Coll. 9. Tit. 1.

This old mode of citation is now wholly obsolete, and as the novels, at least in all the modern editions, are arranged by numbers which run continuously through all of the collations, the single novels are cited according to their present numbers without regard to the collation; the above passage is cited thus: Nov. 118. cap. 1.¹

A new critical edition has been begun by *Heimbach*, bearing the title of *Authenticum Novellar. constitutionum Justiniani*, etc., Leipsic, 1846. Respecting later Latin translations of the sixteenth and eighteenth centuries, see § 113, *infra*.

¹ In the glossed editions we certainly should not seek for them under this number. See end of § 80, *supra*.

THIRD DIVISION.

HISTORY OF THE ROMAN LAW AFTER JUSTINIAN.

I. IN THE ORIENT.¹

GRECIAN WRITINGS ON JUSTINIAN'S LAW BOOKS.

§ 83. As the Latin language, in which Justinian's law books were chiefly written, was not the vernacular of the Byzantines, Grecian translations of them became necessary. These soon arose through the lectures which were delivered in the law schools, according to the method of study prescribed by Justinian (§ 73, *supra*, note 5). These elucidations in the vernacular, which sometimes were voluminous (εις πλάτος) and at other times brief, notwithstanding they did not maintain the literary excellence which Justinian prescribed for the jurists (§ 73, *supra*), came into the hands of the practitioners and were more used than the Latin law books. This is especially applicable, in the case of the Institutes,² to the paraphrase of Theophilus (§ 76, *supra*); in the case of the Pandects, to the voluminous elucidation of Stephanus, to the less voluminous Dorotheus, and to the brief sketch of Cyrillus and of the so-termed Anonymus, i. e., the above-mentioned (§ 81) Julianus;³ and in the case of the Code to the works of Thalelaeus, to the smaller work of Isidorus, and to the brief elucidation of Anatolius and of Theodorus.⁴ The novels, which were chiefly issued in Greek, but which were very diffuse, were preferred to be read in extracts, of which there were several compilations, namely,⁵ two⁶ by the advocates Athanasius⁷ and Theodorus.⁸ In addition to such writings there also appeared, in the period immediately after Justinian, many works of another kind which treated of different branches of law,⁹ as also many treatises

¹ *Suarezii*, Notitia Basilicor. (Rom., 1637), Recensuit et observationib. auxit, *Pohl*, Leipsic, 1804; *Heimbach*, de Basilicorum origine, Leipsic, 1825; *Zachariæ*, historiae juris græco-romani delineatio, Heidelberg, 1839; *Mortreuil*, histoire du droit Byzantin., Paris, 1843-1846, 3 vols.; *Puchta*, Instit. §§ 141 and 142.

² On the writers of the first period after Justinian and their works, see, *Mortreuil*, pp. 98-136, 251-326.

³ On this and other editions, see *Reitz*, ad Theophil. T. II. p. 944, *seq.*; *Heimbach*, de Basilicor. orig. p. 22, *seq.*; *Zachariæ*, Delin. p. 27, *seq.*

⁴ On this and several briefer editions, see *Zachariæ*, Delin. p. 28, *seq.* On an extract from *Stephanus*, see *Zachariæ*, *Avd.* p. 176, *seq.*, and fragments thereof, p. 181, *seq.*, Leipsic, 1843.

⁵ On the Latin of Julian, see § 81, *supra*.

⁶ The fragments of extracts by an unknown are reprinted in *Zachariæ*, *Avd.* p. 196, *seq.*

⁷ Published in *Heimbach*, *Avd.* T. I, Leipsic, 1838.

⁸ Published by *Zachariæ* in his *Avd.*

⁹ E. g. die *Glossæ nomine* or *Δεξις Πομπαινα*, i. e., word explaining, published by *Lebbé*, Paris, 1606, further in his *Glossaria Polyxeni, Zyrilli aliorumque*, Paris, 1679; also in *Otto*, *Thes.* T. III. p. 1697, *seq.* Also the compilation of the *leges rus-*

on single doctrines.¹ The works of that period on the canon law deserve to be mentioned.²

ACTIVITY OF THE LEGISLATURE.

§ 84. Leo the Isaurian and his son Constantine, probably in the year 740, in order to terminate the confused uncertainty of the law, and especially to insure the use of the new ordinances,³ published the *ἐκλογή τῶν νόμων ἐν συντόμῳ γενομένη*, which, in eighteen titles, presents a complete remodel of Justinian and subsequent law.⁴ Thereupon followed, under Basilus Macedo, in the year 878, the *πρόχειρος νόμος*, in forty titles, extracted partly from Justinian's law books, partly from the eclogue, and partly from the newer ordinances,⁵ and revised in the year 885 as *ἐπαναγωγή τοῦ νομον*.⁶ In the prefaces to these two manuals Basilus mentions a greater labor, which he terms *ἀνακάθαρσις τῶν παλαιῶν νόμων* (i. e., *repurgatio veterum legum*).⁷ From this labor, unquestionably, proceeded the work⁸ which his son Leo Philosophus published, and which sometimes is termed *βασιλικός*⁹ (sc. *νόμος*), sometimes *βασιλικά*¹⁰ (sc. *νόμιμα*), sometimes *ἐξακοντάβιβλον*, and at length *ἀνακάθαρσις τῶν νόμων*. It is a

tixæ militares and *navales*, which are appended to the later law books, appears to belong to this time. The first were especially published by *Balduinus*, Lov. 1542, all three by *Schardius*, Basel, 1561, and by *Leunclavius* in the *Jus. græco-rom.* T. II., and the third especially by *Pardessus*, in the *Coll. des lois maritimes*, Paris, 1828, T. I. p. 231, *seq.* See *Zachariæ*, Delin. p. 30, *seq.*; *Böcking*, Instit. § 23, note 21.

¹ Especially one on the division of time (*Λίροναι*) lastly published by *Zachariæ*, Heidelberg, 1836, and a little work *de actionibus* (*Λι ἀγωγαι*), published in *Heimbach*, *observat. jur. græco-rom. spec. I.*, Leipsic, 1830. Others are mentioned. See *Heimbach*, de *Basilicor. or.* p. 76, *seq.*; *Zachariæ*, *supra*, p. 71.

² Collections were made of the sources of the church law (*collectiones canonum*) and of the secular law (*collectiones constitutionum ecclesiasticum*), the whole bearing the title *nomocanon*. The printed editions of this work are mainly due to the *Ἀνέκδ.* of *Heimbach*. See *Mortreuil*, I. p. 187; II. p. 477; III. p. 377.

³ *Zachariæ*, Delin. p. 37, *seq.*

⁴ *Biener*, *Vorsch. zur Revis. des Just. Codex*, p. 224, *seq.*; *Zachariæ*, *supra*, p. 14, p. 41.

⁵ Edition with rich Prolegomena by *Zachariæ*, Heidelberg, 1837.

⁶ *Zachariæ*, *ὁ πρόχειρος νόμος*, p. lxvi, *seq.* It has descended to us imperfectly. The first nine and the eleventh titles were first published by *Leunclavius* in *Jus græco-rom.* Vol. 2, p. 82, *seq.*, and the preface by *Witte* in the *Rhein. Mus.* Vol. 3, p. 28.

⁷ In the first preface sixty books are spoken of; in the second preface only forty are mentioned.

⁸ How such notice comports with the *Basilikon* published by Leo Philosophus the opinions are contradictory. See *Heimbach*, de *Basilicor. orig.* p. 3-18; *Zachariæ*, *ὁ πρόχειρος νόμος*, p. lxxiv, *seq.*; *Heimbach*, *Ἀνέκδ.* Vol. 1, p. xxxix, *seq.*; *Zachariæ*, Delin. p. 42, *seq.*

⁹ This and the following expression are evidently deducible from *βασιλεὺς*, not from *Basilus*: *Deurer*, *Grundriss*, § 24.

¹⁰ It is frequently mentioned that *Constantinus Porphyrogeneta* caused a new edition to be published in the middle of the tenth century bearing this title. See the writers cited in note 8.

compilation in which are reconciled the contradictions out of the Greek remodelling of the three Justinian law books, out of the novels, and out of the manual of Basilus, wherein the cognate passages of a rubric out of these various sources are formed into a title and the several titles into a book, the whole number of books being sixty.¹ This comprehensive paraphrase of the Justinian law has come to us very imperfectly.² It is important for the study of the Justinian law,³ especially in restoring therefrom the lost passages of the *Corpus juris civilis*. But it must be very cautiously used in the emendation of single passages or for interpretation. The emperor Leo, in addition to the *Basilica*, issued many new ordinances⁴ between the years 887–893, whereby much of the Justinian law was changed. The collection thereof caused by him contains, as descended to us, one hundred and thirteen novels. These were originally written in Greek,⁵ but were translated into Latin by Agylæus in 1560 and reissued in 1561, and since that time have been appended to the *Corpus juris civilis*.⁶

SCHOLIA TO THE BASILIKON.

§ 85. To the manuscripts of the Basilikon notes have been added, which are termed *scholia*. The most ancient of them consist partly in references to passages in the *Corpus juris civilis*, or to other passages in the Basilikon,

¹ See the preface by Leo, and Heimbach in Richter's Krit. Jahrb. Vol. 6, p. 269, *seq.*

² Of seventeen books we have naught more than the restorations made from later elaborations and references, and of at least ten others it is partly certain and partly more or less probable that we possess them only imperfectly: *Zachariæ*, Delin. p. 46, *seq.* The first edition, which is accounted possibly perfect, is βασιλικὸν libros LX. græce edidit et in latinam linguam transtulit et glossas veterum Ictor. addidit, *Fabrotius*, Paris, 1647, 7 vols. fol., to which supplements have been added by *D. Ruhnkenius* (the 8th vol.) in *Meerman*, Thes. Vols. 3, 5; *Pardessus*, coll. des lois maritimes, Vol. 1, p. 179, *seq.* A new, perfect and critical edition has appeared since 1833 by *Heimbach*, Leipsic, 1833. There has also appeared *Zachariæ*, Lib. XV. XXIII. Basilicor., Leipsic, 1846. A comparative table of the Basilics and of the *Corpus jur. civ.* is contained in *Haubold*, manuale Basilicor., Leipsic, 1819. Continual references to the Basilics are made in the new editions of the *Corp. jur. civ.* by the brothers *Kriegel* and by *Beck* (§ 116, *infra*).

³ See *Zachariæ*, Delin. p. III. VII.; *Fuchta*, Instit. § 142.

⁴ On the novels of the Byzantine emperor since Basilus, see *Zachariæ*, *Αἱ νόμοι*, p. 37, *seq.*, Delin. p. 50, *seq.*, p. 108, *seq.*, *Artaud*, p. 195; *Witte*, *Imperator græco-rom. const.* IX., Halle, 1840; *Heimbach*, *Artaud*. Vol. 2, p. 261, *seq.* A complete edition, bearing the title *Novellæ constitutiones Imperatorum post Justinianum*, *Zachariæ a Lengerthal*, Leipsic, 1857, forms part III. of the *Jus Græco-Romanum* mentioned in § 86, *infra*, notes 4, 7 and 8.

⁵ They were first issued in Greek by *Scrimger*, Paris, 1558; *Beck*, *de novellis Leonis*, edid. *Zepernick*, Halm, 1779.

⁶ The edition of *Contius*, Lyons, 1571, is in both languages. They are also collected in *Edm. Bonifidius s. de Bonne-Foy*, *jus orientale*, Paris, 1573, and in *Leunclavius*, *jus Græco-Romanorum*, Frankfort, 1596.

partly in short explanations of words or things, partly in passages out of writings on the *Corpus juris*, and sometimes on a part of the same from which the passage to be explained is taken. These notes were added to the Basilikon immediately after its compilation or shortly thereafter, probably as an official comment. Subsequently,¹ after the prevailing law had further departed from the Justinian law, new scholia were added, which were derived from the more recent law sources and literature, and which related partly to the text of the Basilikon and partly to the more ancient scholia; and toward the end of the twelfth century the ancient and modern scholia were prepared for practical use into a continuous commentary on the Basilikon, similar to the Accursian *glossa ordinaria* to the *Corpus juris civilis* (see § 90, *infra*, the end).²

WRITINGS OF THE JURISTS AFTER BASILIUS MACEDO AND LEO.

§ 86. There was considerable activity in the first three centuries of this period in the writing of books on law. For a considerable time the *Corpus juris civilis* was still used in connection with these writings,³ but subsequently this was no longer customary. The writings of this period were adapted for practical use. They contained chiefly collections of law maxims,⁴ monographs and an index to the Basilikon and condensed paraphrases of such index, several of which bear the title of synopsis⁵ and reproductions of the more early manual. From the beginning of the thirteenth century, the political relations of the Byzantine empire were unfavorable to the culture of the law, and but a

¹ Zachariæ, Delin. § 38; Mortreuil, II. § 149, *seq.*, 387, *seq.*, III. p. 230, *seq.*

² By one not known, probably a pupil of Michael Hagiotheodorita.

³ As, *e. g.*, in the Ecloga or Epitome mentioned in note 8, and in the *τοιήμα* mentioned in note 7, *infra*.

⁴ Such a one is probably the *Πείρα*, composed in the eleventh century. Zachariæ, Delin. p. 67, *seq.*; Mortreuil, II. p. 474, *seq.* Single editions under the title *Practica exactis Eustathii Romani*, edited by Zachariæ v. Lingenthal, Leipsic, 1856, which to be regarded as a continuation of the collection mentioned § 84, note 6, *supra*.

⁵ See Zachariæ, Delin. p. 81, *seq.*; Mortreuil, p. 456, *seq.*

⁶ Two of them, the so-termed synopsis major and the so-termed synopsis minor are written in alphabetical order. The first *Εκλογή καὶ σύνοψις τῶν βασιλικῶν*, etc., the tenth century was arranged by Löwenklau according to the order of the Basilikon and was published under the title *Basilikon libror. LX. Ecloga*, Löwenklau, Bas. 1575. The second Eclogue *Τὸ μικρόν κατὰ στοιχείον* is a recompilation of the twelfth or thirteenth century of that which Michael Athaliates composed in 1072. A third Eclogue was written in verse and is termed *Πόημα νομικόν*, and was composed in the beginning of the fifteenth century by Michael Psellus. Zachariæ, Delin. p. 70, *seq.* Mortreuil, II. p. 435, *seq.*, III. 209, 298, 470, *seq.*

⁷ Zachariæ, Delin. p. 77. Among the numerous writings of this kind is the compilation of the year 920 of the Basilic Prochiron, of which the first half (twenty-three of fifty titles) was published by Zachariæ v. Lingenthal in his *Jus Græco-Rom. P. II.* under the title *Ecloga legum in epitome exposita*. See Zachariæ, Delin. § 3 Mortreuil, II. p. 372, *seq.*

work of this period can be presented, namely, the *Πρόχειρον τῶν νόμων* of Constantius Harmenopulus, of the middle of the fourteenth century, which is extracted chiefly from the manuals of Basilus, the synopsis of the Basilikon, and the *Περίαι*, and is divided into six books.¹

ROMAN-GREEK LAW IN MODERN GREECE.²

§ 87. After the conquest of Constantinople and the destruction of the Grecian empire by the Turks in the year 1453, the Greeks became the subjects of the Turks, but were permitted after their subjection to be governed by their own laws. The Basilics, therefore, continued to be of great authority with them, and even form at the present day the principal foundation of their private law.³ And now the authority of law has been given to Harmenopulus.⁴ The French law has a preponderating influence on the modern legislation of the kingdom of Greece.

II. IN THE OCCIDENT.

A. ROMAN LAW IN ITALY.

1. *Before the Glossators.*

§ 88. Justinian's law books were originally intended only for the Orient; but after Justinian in the year 535 had conquered the Ostrogoths, who then ruled Italy, and had again subdued that country to his authority, he immediately sent his law books to it,⁵ and by an edict ordered them not only to be introduced into the courts, but also to be explained in the law school in Rome. He confirmed all this in his *sanctio Pragmatica* of the year 554, which has been preserved by Julian in his *Epitome of the Novels* (§ 81, *supra*).⁶ From this time on, notwithstanding all the political changes which took place in Italy in the subsequent times, the use of Justinian's law books continued

¹ It was first published by *Adameus*, Paris, 1540. The most recent edition is by *Heimbach*, Leipsic, 1851; *Zachariæ*, Delin. § 49; *Mortreuil*, III. p. 349, 495, *seq.*

² *Thémis*, Vol. 1, p. 201; *Maurer*, das Griechische Volk in öffentlicher, kirchlicher und privatrechtlicher Beziehung, Heidelberg, 1835; *Geib*, Darstellung des Rechtszustandes in Griechenland während der türkischen Herrschaft, Heidelberg, 1835; *Zachariæ*, Delin. p. 85, *seq.*

³ *Thémis*, *supra*.

⁴ In the year 1822 the Basilics were recognized as a general law book; in the year 1828 Harmenopulus was substituted for it; in the year 1830 it was determined that it should only be consulted; but in the year 1838 it was reinvested with the authority conceded to it in 1828. The Basilics are used for the interpretation and explanation of this work.

⁵ Respecting the Edictum Theodorici previously introduced there see § 68, *supra*. *Athalaric* published a similar edict; *Casiodor*. *Variar.* IX. 16; *Gretschel*, ad *Edictum Athalarici regis Ostrogothor.*, Leipsic, 1828.

⁶ It commences with the words *Pro petitione Vigilii* (§ 11), and is appended to the *corpus juris*. See *infra*, § 114, note 2; *Spangenberg*, *Einl.* p. 94.

even under the dominion of the Lombards and Franks.¹ However, under the rule of the Franks the *Breviarium Alaricianum* (§ 68, *supra*) seems also to have been introduced into Italy and to have been revised for the Lombardian Romans.²

Brachylogus.

§ 89. In the general decline of the arts and sciences during the barbarism and anarchy of the middle ages till the twelfth century but little scientific development of the Roman law can be expected; yet of this period a book has been preserved, which on the back of one of the manuscripts in the Imperial Library at Vienna bears the title *Summa novellarum constitutionum Justiniani Imperatoris*,³ but has been better known for a long time by the title *Corpus legum per modum Institutionum* or *Brachylogus juris civilis*. It contains a brief system of the Roman law. It is based more particularly on the Institutes, though the Pandects, the Code and the Novels have contributed to it.⁴ The author of this work is unknown; the title *Brachylogus* was first chosen by a later editor. This book originated in Lombardy about the year 1100.^{5 6}

2. *At the Time of the Glossators.*⁷

§ 90. A new zeal for the study of the Roman law was revived in Italy in the twelfth century, especially at the law school of Bologna. The first who

¹ See *Savigny*, *Gesch. des Röm. Rechts im M. A.* Vols. 1 and 2, and *Walter*, *Deutsche Rechtsgesch.* §§ 43–46, 148, 293, 294.

² Such a compilation of the Breviary for the Italians is in that *Lex Romana* which was first published by *Canciani*, *Leges Barb.* Vol. 4, p. 463, ex Codice Utinensi. It is also in *Walter*, *Corpus juris Germanici antiqui* (Berlin, 1824, T. 3, p. 691). Thereon see *Savigny*, Vol. 1, cap. 5, No. VIII. p. 363, 2d ed. p. 426; Vol. 4, p. 470.

³ This title, which signifies an abridgment of the latest Justinian law, *Hugo* regards as the original one: *Beitr. zur Bücherkenntniss*, Vol. 2, pp. 45 and 280. *Böcking* is of a different opinion on the title of the *Corpus legum* or of the *Brachylogus juris civilis*: im Rhein. Museum, Vol. 4.

⁴ The *Breviarium* is also a source in addition to the *corpus juris*.

⁵ See *Hugo*, *Gesch. des R. R.* since Justin. 3d ed. p. 91; *Cramer*, *dispunct. juris civilis*, Suerini, 1792, cap. 12; *Weis*, *de ætate Brachylogi*, Marburg, 1808; *Spangenberg*, *Einl.* p. 578; *Savigny*, Vol. 2, cap. 14, No. III. p. 238, 2d ed. p. 251.

⁶ The *Brachylogus* was first printed in the Senneton edition of Justinian's law books, Lyons, 1549, 1550, as an appendix to the Institutes (see note 3, § 115, *infra*). The newest critical edition is *Corpus legum s. Brachylogus*: *Böcking*, Berlin, 1829, the preface of which contains a detailed account of the manuscripts, editions, country, age and sources of this work. On the *Epitome juris civilis incerti scriptoris ex Codice*, Tübingen, see *Savigny*, 1st ed., Vol. 2, p. 248; 2d ed., Vol. 2, § 91, p. 264, note b; *Specker* (*Pr. Schrader*), *Diss. qua epitome institutionum*, Tübingen, 1819. It is not a rewriting of the *Brachylogus*, as *Savigny* formerly thought, but an independent work of the time of the glossators.

⁷ On the glossators and their immediate successors, see *Panciroli*, *de claris legum*, Venice, 1637; 2d ed., 1655, ed. by *Hoffman*, Leipsic, 1721; *Sarti et Fattorini de claris Archigymnasii Bonon. professoribus*, Bologna, 1769, 1772; *Savigny*, *Röm. Recht im Mittelalter*, Vol. 3, cap. 18, 23, 24, Vol. 4, 5.

lectured there on the Roman law was *Pepo*; he appears to have been unimportant.¹ He was followed by the highly celebrated *Irnerius*, who lived and taught at the beginning of the twelfth century, and who is to be regarded as the true founder of the flourishing new school.² He illustrated the text of Justinian's law books by brief annotations on their matter and language, which were termed *glosses*. At first these glosses were interpolated in the text beside the words to which they referred (*glossæ interlineares*), but subsequently they were inserted in the margin, partly beside and partly under the text (*glossæ marginales*). In this method of illustration *Irnerius* was followed by his pupils and successors in office, whence they were named glossators.³ The most celebrated among them are *Bulgarus* (who died about 1166) and his antagonist, *Martinus Gosia*, in 1165; *Ugo* or *Hugo de Porta Ravennate*, in 1168; *Jacobus*, in 1178;⁴ *Rogerius*, in 1192; *Albericus*, in 1194; *Wilhelmus de Cabriano*, *Placentinus*, in 1192, and his antagonists, *Henricus de Baila* and *Johannes Bassianus*; *Burgundio*, in 1194, *Pilius*, in 1208; *Cyprianus*, *Azo*, in 1230; *Hugolinus Presbyteri*, about 1234; *Jacobus Balduini*, in 1235; *Roffredus*, in 1243; and lastly *Accursius*, about 1260, and his antagonist, *Odofredus*, in 1265.⁵ *Accursius* rendered great service by collecting the glosses of his predecessors and compiling them into a *glossa ordinaria*, in which he inserted many of his own notes.⁶ This glossa was subsequently enlarged by many additions from the writings of later jurists.⁷

¹ *Odofredus*, in *Dig. vetus L. jus civile* 6. de justitia et jure; *Savigny*, Vol. 3, chap. 22. I, 1st ed. p. 395; 2d ed. p. 427.

² In the documents of the twelfth century he is sometimes termed *Magister Guarnerius*, or *Warnerius de Bononia*; and *Odofredus*, *supra*, terms him the "primus illuminator scientiæ nostræ," and sometimes "lucerna juris."

³ As to the glossators' method of teaching, see *Savigny*, Vol. 3, chap. 23 and 24; Vol. 5, chap. 41; *Spangenberg*, *Einleit.* p. 255, and *Eichhorn*, *Deutsche staats und Rechtsg.* Vol. 2, § 268.

⁴ These four are commonly deemed however, without sufficient reason, to have been the pupils and immediate successors in office of *Irnerius*, and the latter is said to have characterized them by the following distich:

*Bulgarus os aureum, Martinus copia legum,
Mens legum est Hugo, Jacobus id quod ego.*

Savigny, Vol. 4, pp. 64, 67; 2d ed. p. 70.

⁵ The others are mentioned in *Savigny*, Vols. 4 and 5. Respecting the controversies of the glossators, see *Rogeri Beneventani*, de dissensionibus dominorum, ed. by *Haubold*, Leipzig, 1821; *Savigny*, Vol. 5, p. 221. And especially the following work, which contains a number of unpublished collections not in the preceding work of *Haubold*: *Dissensiones Dominorum*, ed. by *Hænel*, Leipzig, 1834.

⁶ *Hugo*, *Gesch. des R. R. seit Justin.* p. 145; *Schrader*, *Prodromus*, p. 240; *Savigny*, Vol. 5, p. 237; *Spangenberg*, p. 266.

⁷ *Clausen*, *Spec. denuo edendæ Accursianæ glossæ*, Halle, 1827.

* *Authenticæ in the Code.*

§ 91. The glossators also sought to facilitate the study of the law by inserting extracts from Justinian's Novels into those constitutions of the Code which were altered or modified by the Novels.¹ These extracts were subsequently termed *Authenticæ*,² but should not be confounded with the complete Novels to which the glossators applied the same name (§ 81, *supra*). They were embodied in the Code in the same manner as the glosses, and are still to be found in all the editions of the Code, and are generally distinguished by italics. In the citation of them the word *Auth.* is placed first, then the initial words, and lastly the rubric of the title in which they are contained; or, according to the modern mode, the number of the book and of the title, or both the rubric and the number of the book and title. Thus: *Auth. Et non observato C. de testamentis* (6. 23).

Different Kinds of Authenticæ.

§ 92. The authenticæ in the Code are of two different-kinds. The most of them (220 in number) are such extracts from Justinian's Novels as have just been mentioned. These naturally have only legal authority so far as when they agree with the source whence they are derived.³ But the others (13 in number) are extracts⁴ from later ordinances of the emperors Frederick I. and II. (of the twelfth and thirteenth centuries), which were inserted in the Code by the professors of law in Bologna.⁵ These are termed *Authenticæ Fridericianæ*, and are independent ordinances, and, being the latest, have the preference over all the earlier constitutions. The most of them, namely, the eleven authenticæ of Frederick II., appear externally as extracts from Novels,⁶ because they are inserted in the *collatio decima Novellarum* (114, *infra*) as a new ordinance. The two of Frederick I. have the caption, *Nova constitutio Friderici*,⁷ but they are all cited like the Novel extracts.

¹ *Biener*, histor. Authenticarum Codici et Institutionibus Justiniani, sect. I., II., Leipsic, 1807; *Spangenberg*, Einl. p. 135; *Savigny*, R. R. im M. A. Vol. 3, p. 488, *seq.*; 2d ed. p. 527, *seq.*, and p. 522; 2d ed. p. 564, Vol. 4, p. 39, *seq.*

² This name is generally supposed to have been taken from *glossæ authenticæ*; but it more probably arose from the inscription of these passages "in Authent.," as the glossators so termed the Novels, which, by an inaccurate use of the language, became "Authentica" (§ 81, *supra*, note 6).

³ This is not always the case. See, *e. g.*, Novel 117. c. 7, and *Auth. Si pater C.* 5. 24.

⁴ *Spangenberg*, Einl. 139.

⁵ *E. g.*, *Auth. Gazaros, C.* 1. 5.; *Auth. Omnes peregrini, C.* 6. 59. See note 7, *infra*.

⁶ Namely, as const. final. under the title rubric, *De statutis et consuetudinib. contra libertatem ecclesiæ*, etc.

⁷ Namely, *Auth. Sacramenta puberum, C.* 2. 28, and *Auth. Habita, C.* 4. 13. In many editions this is true as to one or the other emanating from Frederick II., as, *e. g.*, in the *Auth. Cassa, C.* 1. 2.

Authentics in the Institutes and Novels.

§ 93. The Institutes, like the Code, also contain extracts from the Novels, inserted therein by the glossators in the form of Authentics. They are to be found in a greater or lesser number, and with great variation, in most of the manuscripts containing the ante-Accursian gloss, but they seldom appear in the manuscripts containing the Accursian gloss, and only in a few printed editions of the Institutes.¹ Though they differ greatly from the common gloss, yet for a long time they were not noticed and were nigh obsolete, till recently, when Savigny and Hugo brought them again into notice.² Even in the glosses to the Novels there are such Authentics, though only in a few manuscripts.³

B. ROMAN LAW IN FRANCE.

1. *Before the Glossators.*

§ 94. In the empire of the Franks, who in the time of Justinian ruled over Gaul, the law which governed the Romans was the *Breviarium Alaricianum*. The Roman law was also used in France, as in Italy, through the whole of the middle ages.⁴ As early as the middle of the eleventh century Lanfranc, archbishop of Canterbury, is said to have taught Roman law, while abbot of Bec, in Normandy.⁵ And that in France, even before the time of the glossators, reference was made to Justinian's law books, is best proven by a book bearing the title *Petri exceptiones legum Romanorum*.⁶ Savigny says that this book originated near Valence in France.⁷ It originated after the middle of the eleventh century.⁸ The author is an unknown jurist. The work contains a systematic arrangement in four books of the then existing

¹ Schrader, Prodomus, § 42, seq. They were first reprinted in Cujas' edition of the Institutes, 1585, as an appendix; then in the edition of Bandoza, 1591, who first inserted them in the text. They have been inserted in the text of the Institutes in Beck's edition of the *corpus juris civilis*, Leipzig, 1825, and in Schrader's edition, Berlin, 1832, as an appendix to the Institutes, p. 781-789.

² Savigny's verm. schrften, Vol. 3, No. 20; Spangenberg, Einl. p. 141; Savigny, Röm. Recht. im M. A. Vol. 4, p. 50, seq., 2d ed. p. 53, seq.

³ Savigny, Vol. 3, chap. 24, p. 522, 2d ed. p. 565; Vol. 4, p. 53, 2d ed. p. 57.

⁴ Spangenberg, Einl. p. 100.

⁵ Before the mention of this book it was supposed that Lanfranc, archbishop of Canterbury, as abbot of Bec, in Normandy, already in the middle of the eleventh century taught the Roman law. This is not proven; but even if it were true, it is unimportant: Savigny, Gesch. des R. R. im Mittelalter, Vol. 2, p. 225, 2d ed. Vol. 1, p. 466.

⁶ In the language of the middle ages, *exceptio* here means *extract*. Savigny, *supra*, Vol. 2, p. 130, 2d ed. p. 134. See Spangenberg, Einleit. p. 583.

⁷ This work was subsequently adapted for Italy, hence the difference of opinion as to the country of its origin: Hugo, Gesch. des Röm. Rechts seit Justin. 3d ed. p. 92.

⁸ There are reasons that the work originated about a century later. See Savigny, Gesch. des R. R. im M. A. Vol. 7, p. 51, seq.

law in France, and is chiefly Roman law. The sources from which it has been derived are the Institutes, the Pandects, the Code, and the Novels, according to the epitome Juliani.¹

2. After the Glossators.

§ 95. Soon after the study of the Roman law had been revived in Italy by the glossators, a similar zeal was shown for it in the law schools and courts of France.² The present so-termed *Ulpianus de edendo*, which contains a brief exposition of legal procedure extracted from Justinian's law books, was probably written at this time in France, by an unknown author.³ Placentinus, who was previously mentioned among the glossators, studied at Montpellier.⁴ Several pieces of the corpus juris civilis were translated into French in the thirteenth century,⁵ and the Roman law exerted great influence on the form and matter of the French customary law, which at that time began to be written.⁶ Since that time the study of the Roman law⁷ was cultivated by that school of French jurists, particularly of the sixteenth century, whose names are still highly esteemed.⁸

¹ The second and latest edition of this book, which was first printed in Strasburg in the year 1500, edited by Barkow, may be found at the end of the second volume of *Savigny*, *Gesch. des Röm. Rechts*, as Appendix 1, and in the second edition as Appendix 1. A. On the manuscripts of it, see *Savigny*, Vol. 2, p. 130; Vol. 3, p. 662; 2d ed. Vol. 2, p. 134.

² *Savigny*, Vol. 3, p. 313; 2d ed. p. 337.

³ The title of this book was derived from the rubric of its first passage, extracted from Ulpianus de edendo, *Hugo*, *Gesch. des Röm. Rechts.*, p. 94. The first edition from the London manuscript, which was the only one then known, is Ulpianus de edendo, from the Harleian collection edited by *Meywerth* and *Spangenberg*, Göttingen, 1809. See *Spangenberg*, Einl. p. 584. Respecting another manuscript, now in Liege, see *Thémis*, Vol. 7, p. 96. A third manuscript is in Treves. The latest and most copious edition is *Incerti auctoris ordo judicior.*, *Hænel*, Leipsic, 1838.

⁴ *Savigny*, Vol. 4, p. 216; 2d ed. p. 251.

⁵ There is in the Royal Library in Paris the manuscript of a French translation of the thirteenth century of the *Digestum vetus*, bearing the title *le vieux digeste en 24 livres*. On a very early French translation of the Code, see *Cujas*, *Observ.* L. 11. c. 11. L. 16. c. 24.

⁶ The Roman law was favored by the known influential book, *Le conseil que Pierre Desfontaines donna à son ami et à tous les autres*, published by Du Cange as an appendix to Joinville, *histoire du St. Louis*, and for the second time, according to the best sources, by Marnier, Paris, 1846.

⁷ Lectures thereon, in Paris, were forbidden by Pope Honorius III. in the year 1220 in the cap. super specula 28. X. de privilegiis 5. 33, and this interdict was first wholly repealed by Louis XIV. in the year 1679, by the edict, qui regle les études de droit; but as this interdict only affected Paris, it had the effect of increasing the number of young French students in the law schools of other French cities and in Italy: *Walter*, *Kirchenrecht*, § 355. On the Decretal, *super specula*, see *Savigny*, *Gesch. des Röm. Rechts.* im M. A. Vol. 3, p. 339, *seq.*; 2d ed. p. 136, 362.

⁸ *Haubold*, *inst. lit.* p. 58-80; *Hugo*, *Gesch. des Röm. Rechts.*, 3d ed. p. 254.

C. ROMAN LAW IN ENGLAND, SPAIN, THE NETHERLANDS AND RUSSIA.

§ 96. Traces of the scientific disquisition of the Roman law at a very early period are likewise found in England.¹ A Lombardian jurist, Vacarius, who had studied law in Bologna, went to England about the middle of the twelfth century for the special purpose of explaining the Roman law to the clergy there. He lectured at Oxford in the year 1149, and wrote a work on the Roman law, in nine books, bearing the title *Liber ex universo enucleato jure exceptus et pauperibus præsertim destinatus*.² However, as a general subsidiary law, the Roman was never used in England.³ On the other hand, it has been cultivated since the sixteenth century with great industry in Spain⁴ and in the Netherlands,⁵ and the Netherland jurists especially formed an excellent school, which acquired great distinction for its exegetical and critical labors on the Roman law books.⁶ In Russia the Roman-Greek law was never introduced as an auxiliary law and was never studied in their universities; nevertheless, it has not been without influence in the development of the Russian law, as appears especially from the *Kormschaga-Kniga* (the ecclesiastical law), and in some measure also from the *Uloshenie* (the secular law).⁷

¹ *Savigny*, R. R. im M. A. Vol. 2, chap. 10; Vol. 3, 379; 2d ed. p. 411; *Spangenberg*, Einl. p. 104.

² See Wenck's *Magister Vacarius*, primus juris Romani in Anglia professor, Lipsic, 1820. See *Hugo*, *Gesch. des R. R. seit Justin.* p. 155; *Dirksen*, *Abh.* Vol. 1, p. 319; *Savigny*, Vol. 4, p. 348; *Phillips*, *engl. Reichs-und Rechtsg.* Vol. 1, p. 256, *seq.* Of an independent work of this jurist, *Bachofen* acquaints us by information of a manuscript in the university library of Cambridge, *Summa de matrimonio* of the *Magister Vacarius* in *Richter's Krit. Jahrb.* Vol. 13, p. 92.

³ *Hugo*, *supra*; *Diemer*, *Comm. de usu et auctoritate juris Romani in Anglia*, Part 1, Lipsic, 1817; *Falck*, in his preface to Colditz's German translation of *Blackstone*, Vol. 1, p. 27; *Phillips*, in *Mittermaier's and Zachariä's Krit. Zeitschrift des Ausl.* Vol. 1, p. 400, *seq.*

⁴ An account of the influence of the Roman law on Spanish jurisprudence is contained in the Spanish translation of this (*Mackeldey's*) Handbook by *Collantes Bustamante*, Madrid, 1829.

⁵ Respecting the introduction of the Roman law into Belgium, see *Mémoires sur le questions proposées en 1780*, Brussels, 1783, and of which *Savigny* further speaks in Vol. 3, p. 651, *seq.*, and in the 2d ed. Vol. 1, p. 10, *seq.* Respecting its introduction into Holland, see *Warnkönig*, *Encycl.* p. 255, note 2.

⁶ *Spangenberg*, *Einl.* p. 263; *Haubold*, *inst. lit.* p. 122, *seq.*; *Hugo*, *supra*, p. 455, *seq.*

⁷ *Clossius*, *Hermeneutik des Röm. Rechts.*, p. 105, and especially *Reutz's* notice thereof, p. 392. And the Russian translation of this Handbook by *Roschdestwensky*, 1829 and 1830, § 69, treats of the introduction of the Roman law into Russia. Respecting the Slavonian countries generally, see *Maciejowski*, *History of the Slavonian law*, translated into German by *Busz and Nawrocki*, Stuttgart, 1835.

FOURTH DIVISION.

INTRODUCTION OF THE ROMAN LAW INTO GERMANY AND ITS
PRESENT-USE.

SOURCES OF THE OLDEST GERMAN LAW.

§ 97. In the earliest times all the law of the German nations was simply the law of custom. Founded on opinions and manners, and preserved in living remembrance by songs and rhymes, a long time elapsed before committing it to writing was even thought of.¹ We know but very little of this most ancient German law, and for that which we know we are indebted to Roman writers, of whom Cæsar and Tacitus are the most important.²

THE MOST ANCIENT GERMAN LAW BOOKS.³

§ 98. When at their migration the German nations, especially the Goths, Burgundians, Franks and Lombards, founded new states on the ruins of the western Roman empire (§ 56–68, *supra*), the German national laws were begun to be collected and committed to writing at the close of the fifth century. Thus gradually originated between the fifth and beginning of the ninth centuries the Visigothic, the Burgundian, the Salic, the Ripuarian, the Alemannic, the Lombardian, the Bavarian, the Frisian, the Saxon and Thuringian law book (*Lex*).⁴ These most ancient German law books, now also known by the name of *Leges Barbarorum*, were written in the Latin of the middle ages, because the German as a written language was not yet sufficiently cultivated. These laws were very imperfect and meagre; they were merely adapted to the necessities of the moment in those rude times, and hence were confined chiefly to the definition of crimes and *wehrgelt*, to successions and to the forms of procedure.⁵

¹ Tacitus, de Germania, chap. 2. It is said that Charles the Great was the first who had these old songs committed to writing. *Eginhart*, in vita Caroli Magni, chap. 29.

² Cæsar, de bello gallico; Tacitus, annal. et histor., but chiefly de situ, moribus et populis Germaniæ. The fragments of the most ancient German law which are in the latter work have been collected and arranged in *Gebauer*, vestigia juris Germanici antiquissima, Göttingen, 1766. See *Walter*, deutsche rechtsg., Bonn, 1857, § 9, *seq.*

³ For further particulars on these most ancient German laws, as well as on their sources, briefly touched on in §§ 99 and 100, *infra*, and on the later laws of the middle ages mentioned in § 101, *infra*, the histories of the German nation and of law must be consulted.

⁴ *Lex*, in the language of the middle ages, does not mean a code, but a body of law (an aggregation or collection of law not codified or systematized). Thus, *Lex Salica* meant the Salic law, as the *Lex Romana* meant the Roman law.

⁵ Respecting these more ancient German laws, see especially *Eichhorn's Deutsche Staats und Rechtsgeschichte*, Vol. 1, § 29–41; *Walter*, deutsche Rechtsg. §§ 31–46, 131–148; *Savigny*, Röm. Recht im M. A. Vol. 2.

They are found in *Walter*, Corpus juris Germanici antiqui., 3 vols. (each in two parts), Berlin, 1824, Vol. 1, Pt. 2.

CAPITULARIES OF THE FRANKISH KINGS.

§ 99. A new source of law was opened under the dominion of the Franks in the Capitularies of their kings.¹ These were laws in the strict sense of the word, which were promulgated by the kings with the aid of the clergy and the nobles on the Marchfield, and afterwards on the Mayfield. They related not only to national and private law, but also to ecclesiastical and beneficial matters.² A collection of these Capitularies, consisting of four books and three supplements, was made by the abbot Ansegisus in 827.³

BOOKS OF FORMS.

§ 100. A scientific compilation of the German law could not be expected at this period. There were no law schools, and legal knowledge was acquired mostly by practice. Experienced practitioners, however, especially the clergy, at an early period composed certain formularies for both judicial and extra-judicial transactions. From these originated the so-termed form books,⁴ one of the most important of which was prepared by the monk Marculf, about the middle of the seventh century.⁵

GERMAN LAW WORKS OF THE MIDDLE AGES.

§ 101. After Germany, by the treaty of Verdun in 843, had been separated from France and Italy, with the extinction of the Carlovingian line the authority of their laws gradually ceased, and these, as also the ancient German law books, in consequence of the change of times and manners, fell into disuse. In the turbulent times of the law of might, and in the anarchy caused especially by the feudal institutions, law and its administration could not thrive in Germany. After the ancient national laws and the laws of the Franks had disappeared, nearly the whole law again rested solely on unwritten customs, on the wisdom and decisions of the judges and their assessors, and on agreements of the interested parties (feudal services and tenures)⁶ It was not till the twelfth and thirteenth centuries that any record was made of the rules of law

¹ *Eichhorn*, R. G. §§ 149, 150; *Zöpfl*, § 17; *Walter*, §§ 150, 151; *Stobbe*, § 20; *Schulte*, § 37.

² The more recent collection of sources by Benedictus Levita does not belong here, nor do the three or four *additiones* by an unknown. *Pertz*, mon. Germ. leg. T. II. P. 2. p. 17, *seq.*; *Walter*, *supra*.

³ The most complete printed collection hitherto was *Baluzii*, Capitulari regum Francorum, T. 1, 2, Paris, 1677. The last edition by *De Chiniac*, Paris, 1780, Basle, 1786. At present the best collection is in *Pertz*, *supra*.

⁴ *Eichhorn*, Rechtsg. § 156; *Savigny*, Vol. 2. p. 122, 2d ed. § 44; *Zöpfl*, § 16; *Walter*, § 152.

⁵ *Marculf*, formulæ veteres, by *Bignon*, Paris, 1613, 1665. They are also contained in *Baluzius*, *supra*, and in *Walter*, Vol. 3. Respecting newly-discovered forms, see the works cited in the preceding note. A new edition of the formulæ *Andegavenses* was edited by *De Rosière*, Paris, 1845.

⁶ *Eichhorn*, deutsche R. G. § 257, *seq.*; *Walter*, §§ 290-292, 295, 296.

which had arisen; many laws of cities on various matters and in various provinces were recorded by public authority,¹ and then originated the so-termed law books of the middle ages, the private labors of experienced men, wherein are set forth the legal principles which were recognized in all Germany, or at least in certain parts of it. The most ancient of these law books is that which originated in the first half of the thirteenth century, termed the "*Sachsen-spiegel*" (Saxon Mirror).² Thus its compiler subsequently termed the sayings of the north Thuringian assessor *Eike von Repgow*. It is divided into common and feudal law. The author derived his knowledge from judicial decisions in Saxony, and hence it contains at least the law of the land in addition to the German common law and many particular Saxon customs. For the parts of Germany in which it was not authority this work was rewritten in the latter half of the thirteenth century. The more copious second law book,³ which also contains many Roman legal principles, the several manuscripts of which vary considerably from each other both in contents and arrangement, in the middle ages was usually termed only "Land and Feudal law, or Imperial law;" in the later centuries it first received the usual name of the "*Schwaben-spiegel*" (Suabian Mirror). A number of treatises were written on these two mirrors. We here speak only of the "Glosses to the Saxon Mirror," which originated in the fourteenth century, and which were enlarged by additions in the fifteenth century;⁴ the "Guide to the Land and Feudal Law," which originated in the fourteenth century,⁵ which treats of judicial proceedings; and of the minor "Imperial law," extracted from the Suabian Mirror.⁶ All of these and similar others were highly useful to the judges and assessors of those times, and consequently attained great authority; but with these exceptions naught was then done for defining and perfecting of the German law. As yet there were no law schools, and the scientific compilation of the German law was not even thought of.

CAUSES OF THE INTRODUCTION OF THE ROMAN LAW INTO GERMANY.⁷

§ 102. During this sad condition of the law and its administration in Germany the study of the Roman law in Italy and France continued to increase, and it was not long before the fame of the University of Bologna and its

¹ *Eichhorn*, § 284, *seq.*; *Mittermaier*, deutsches P. R. § 11; *Walter*, § 306.

² *Eichhorn*, § 279-281, and his *Einl.* §§ 10, 11; *Mittermaier*, deutsch. P. R. § 8, *seq.*; *Walter*, §§ 297, 298, 300.

³ *Eichhorn*, § 282; *Mittermaier*, *supra*; *Walter*, §§ 302, 303.

⁴ *Eichhorn*, § 281; *Walter*, § 299.

⁵ It also bears the title of *Schevencloet*, i. e. Assessors-gloss; *Eichhorn*, § 281; *Walter*, § 301.

⁶ *Eichhorn*, § 283; *Mittermaier*, *supra*, § 9, note 11; *Walter*, § 307, end.

⁷ See, *Duck*, de usu et auctoritate juris civilis Romanorum, London, 1649, 1653, Leyden, 1652, 1654; *Senkenberg*, methodus Jurisprudentiæ, Appendix III., juris Romani; *Spangenberg*, *Einl.* p. 111; *Eichhorn*, *Rechtsg.* pp. 440, 562; *Walter*, deutsche rechtsg. § 354.

great professors extended to Germany also. From that time the Italian universities were frequented by the German youth, who there learned a system of law which was unequalled for copiousness, coherence, acuteness and conscientiousness. It was therefore natural that on their return and induction to public offices they should endeavor to introduce into use and apply in the German tribunals the Roman law which they had learned and admired. The use of the Roman law was greatly promoted by the influence of the clergy, through the close connection which existed between it and the Canon law which was in force in Germany.

The German emperors and territorial lords, who soon discovered how well the Roman law was suited to their interests of absolute sovereignty,¹ readily engaged in their service jurists educated in Italy, especially if they had attained the degree of doctor of both laws (*i. e.*, of the Roman and Canon laws), and promoted them to the highest offices of state. The Germans also willingly assented, since their own country offered naught better, and the existing laws and customs were even inadequate for their former and much more so for their new condition, which was changed by cultivation, commerce, and especially by the vigorous growth of towns and the formation of the class of free citizens, though the then prevailing yet erroneous supposition that the Roman German empire was simply a continuation of the old Roman² contributed greatly to the recognition of the Roman law as authoritative in Germany. As from the time of the fourteenth century universities were established in Germany according to the Italian model, in which professors of the Roman and Canon law were appointed, it could not fail that these foreign laws should continually become more generally introduced into the German courts of law by the professors.³

REASONS FOR THE AUTHORITY OF THE ROMAN LAW IN GERMANY.

§ 103. The authority of the Roman law in Germany is therefore not based on a formal recognition by command of the legislative power, but on its gradual adoption as a law of custom since the beginning of the thirteenth century.⁴ Its authority and general use were long established by custom before a formal confirmation was thought of. An express legal authorization of it was never made. Its only recognition was that in the year 1495. in establishing the court of the imperial chamber, its members should decide according to the imperial and written laws—by the latter of which was understood the Roman and Canon laws.⁵ When thereafter the territorial

¹ *Quod principi placuit, legis habet vigorem* : fr. 1. pr. D. 1. 4. See, fr. 31. D. 1. 3.

² In his act of abdication of 1495 the emperor Maximilian terms the Roman emperors Constantine and Justinian his predecessors in the empire.

³ *Exchhorn*, *Rechtsg.* § 440, *seq.* ; *Walter*, *supra*.

⁴ This is only applicable to the Roman law of Justinian, not to the ante and post-Justinian law, which never came into use in Germany.

⁵ *Reichskammer Gerichts-Ordnung* (Regulations of the Court of Imperial Cham-

power of the German nobles became more extended, and they organized in their states courts of justice after the model of the supreme courts of the empire, they imitated the organization and rules of the latter so far that they referred the members of its courts to the Roman law, or at least tacitly consented to its application.¹

SPECIAL RULES FOR THE APPLICATION OF THE ROMAN LAW IN GERMANY.²

§ 104. The Roman law of Justinian has, however, only such force in Germany as it received by its use or as it acquired by recognition. From this general principle the following special rules are deduced for the application of the Roman law at the present day:

1. *The Roman law forms in Germany in some branches the principal law*; that is, it is so far their chief basis that the German law is only an addition to or modification of it. *In other branches it is only supplementary (in subsidium)*; that is, it only supplies the German law.³ The mutual relations, however, between the Roman and German laws in each branch must be shown in each of the several branches separately.⁴

2. *Only the glossed parts and passages of Justinian's law collections have binding force in Germany. Quicquid glossa non agnoscit, illud nec agnoscit curia.* This principle does not account for the great authority of the glossators;⁵ but its reason was chiefly that only the glossed parts and passages were in Italy, and subsequently in Germany, deemed practically applicable, and therefore they only came into use. The Institutes, the Pandects and the Code are glossed; there are, however, in the last two single fragments and constitutions which are not glossed. In the Pandects are unglossed fr. 4. D. 1. 4; fr. 49. D. 19. 2; fr. 30. 31. D. 22. 3; fr. 7. § 5; fr. 8. 9. 10. 11. D. 48. 20; fr. 10-19. D. 48. 22, and the fragment interpolated between fr. 18 and 19. D. 50. 17. To the non-glossed constitutions of the Code belong the many *leges restitutæ* (§ 79, *supra*), and the whole title *de aleatoribus*

ber) of 1495, § 3. By these the members shall swear to be governed according to the imperial and written laws, and also according to reasonable and honorable regulations, statutes and customs of the principalities, manors and courts: *Eichhorn*, *Rechtsg.* § 442.

¹ See the Leipsic Supreme Court regulations of 1488, those of Brunswick-Wolfenbüttel of 1556, and those of Lippe, and many others.

² *Weber*, *Versuchen über das Civilrecht*, No. 1; *Spangenberg*, *Einl.* p. 167-182.

³ In the doctrines of the principal law the Roman law is also subsidiary, in the wide and usual sense of the word; that is, it is only applicable so far as the rules of the present domestic law, whether of particular law or the common domestic law, are not to the contrary.

⁴ *Reichs-Hofraths-Ordnung* Tit. § 15; *Eichhorn*, *Einl.* § 28.

⁵ Therefore the private opinions of the glossators have no more legal authority than the opinion of any other distinguished modern or ancient jurist. For an application of this to the authentics in the Code, see § 92, *supra*.

(3. 43).¹ Of the Novels, ninety-six are glossed,² and these are those which the glossators originally formed into nine collations (§ 80, *supra*).

3. *Only those glossed passages in Justinian's law books are binding which contain the latest rule of law* (§ 105, *infra*). Consequently the historical materials contained in them, though always of great importance for discovering the latest law, have not binding force.

4. *Those precepts of the Roman law which relate to Roman manners and institutions unknown in Germany are inapplicable there, though glossed.* Accordingly all that relates to the public institutions and government of Rome does not apply in Germany, save in exceptional cases.³ Likewise, those precepts are inapplicable which rest on principles that have never been acknowledged in Germany,⁴ or the objects of which do not exist there.⁵

5. *The Roman law has but slight application to such objects and transactions as were unknown to the Romans and are purely of German origin.* These are to be adjudged according to the German laws and customs, and the principles of the Roman law can only be applied to them with great caution.⁶

6. *With the limitations above enumerated the Roman law has been adopted as common law in complexu; that is, as a whole, and not in detached parts.* Therefore, he who refers to a precept of the Roman law in support of his case has, as is generally said, *fundatam intentionem*; that is, the presumption is in favor of the validity and applicability of the precept referred to till it is shown either that it is no longer applicable because it is within one of the above-mentioned exceptions, or that it has been abolished by later law.

RELATION OF THE SEVERAL PARTS OF THE ROMAN LAW TO EACH OTHER IN GERMANY IN CASES OF CONFLICT.⁷

§ 105. If two or more passages of the Roman law of authority in Germany which treat of the same matter vary from or are in conflict with each other,

¹ G. W. Hugo, on the unglossed passages in the Code, Jena and Leipzig, 1807; *Spangenberg*, Einl. p. 167, *seq.*

² They are, according to the present method of numbering, Novels 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 12. 14. 15. 16. 17. 18. 19. 20. 22. 23. 33. 34. 38. 39. 44. 46. 47. 48. 49. 51. 52. 53. 54. 55. 56. 57. 58. 60. 61. 66. 67. 69. 70. 71. 72. 73. 74. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 105. 106. 107. 108. 109. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 123. 124. 125. 127. 128. 131. 132. 134. 143. 150. 159; *Biener*, Geschichte der Novellen, p. 293, p. 438, p. 547, *seq.* The not specially glossed Novel 150 is a simple extract from Novel 143, and hence is sometimes counted among the glossed.

³ *E. g.*, the privileges of the Fiscus.

⁴ *E. g.*, the principle that a pact does not produce an action.

⁵ *E. g.*, the law applicable to slavery, and to *legitimatio per oblationem curie*.

⁶ *E. g.*, the communion of property in marriage, bills of exchange, insurance, and such succession as may be the object of an agreement; also the legal relations of the nobility and the citizen and yeoman classes. See *Eichhorn*, Einl. § 28.

⁷ *Thibaut*, civ. Abhandl. No. 6; *Savigny*, System, Vol. 1, p. 262-290; *Spangenberg*, Einl. p. 185.

it must be first ascertained whether there is a variance or contradiction, and whether it may not be reconciled by a criticism of the text or by interpretation. If this be ineffectual the general principle applies, that the latest law is preferred. In its special application to each case of conflict, the individual purpose and character of the separate law collections must never be lost sight of. From this the rules follow :

I. If there is a variance between a later law and an earlier law,¹ then the later law prevails.² From which again follows :

1. That the Novels (in Germany only the glossed) are preferred to the Institutes, the Pandects, and the Code, and that among the Novels the later take precedence of the earlier.³

2. That those Constitutions of the *Codex repetitæ prælectionis* which are too recent to have been noticed in the writings from which the Pandects were extracted take precedence of the Pandects, and those which were published after the Institutes take precedence of them, as they also take precedence of old passages of the Code.

3. The passages of the Institutes which contain new regulations, or which refer to the matter of newer regulations which are not contained in the *Codex repetitæ prælectionis*, take the same precedence as if they were in the Code.

II. Constitutions of the Code which have been imperfectly quoted or otherwise incorrectly referred to in the Institutes, as also fragments of the Pandects which have been imperfectly inserted in the Institutes, take precedence of such passages from the Institutes.⁴

III. If there be a contradiction which is not included in either of the foregoing chief divisions, that is,⁵ between several passages from the Pandects,⁶ then either one of the various opinions of the compilers is expressly adopted, in which case such opinion takes precedence; or when no opinion is adopted, no general rule is observed. In reconciling and explaining contradictory passages, regard must be had to the historical and internal coherence of the doctrine in which the contradictory passages oppose, the analogy, the place assigned to them in the compilation, their age, their nature, and the reasons

¹ That much was changed previous to the Novels, which subsequent to Justinian's plan was restored. See § 83, *supra*.

² fr. 4. D. 1. 4. "*Constitutiones tempore posteriores potiores sunt his, quæ ipsas præcesserunt.*" This naturally is also applicable to that older law which is only historically introduced into the Corpus juris.

³ To determine the dates of the several Novels, see *Biener*, *Gesch. der Novellen*, p. 500-530; *Böcking*, *Institut.* p. 735, *seq.*

⁴ The Institutes have naturally the same rank as the passages to which they correctly refer.

⁵ Other examples are given in note 8.

⁶ Justinian does not admit that there are such contradictions, for he says in the *Const. Tanta*, § 16, "*Contrarium autem aliquid in hoc Codice (juris enucleati) positum nullum sibi locum vindicabit, nec invenitur, si quis subtili animo diversitatis rationes executiet.*" See *Const. Dedit*, § 15.

on which they are founded. Which of these shall be conclusive in each case can only be left to the sagacity¹ of a learned and intelligent interpreter.

¹ *Löhr*, p. 215. The same course is pursued when several passages of the Code or when passages of different law books contradict each other, if they be not included in one of the categories mentioned in I. and II. of the text. Among the different views, that only of Mackeldey is given, which is, that generally the Pandects take precedence of the Institutes. See *Thibaut*, civ. Abhandl. pp. 95 and 352, and *Löhr*, p. 214.

FIFTH DIVISION.

OF THE COLLECTIONS OF THE SOURCES OF THE ROMAN LAW,
ESPECIALLY OF THE CORPUS JURIS CIVILIS, THE SEVERAL
PARTS AND VARIOUS EDITIONS OF IT.COLLECTIONS OF ANTE-JUSTINIAN LAW SOURCES.¹

§ 106. Of the collections of the sources of the ante-Justinian law which have been preserved, none of which, however, are as yet complete, the following deserve to be noticed :

1. *Jurisprudentia vetus Ante-Justiniana ex recens et cum notis Antonii Schultingii*, Leyden, 1717. The new edition by *G. Henr. Ayrer*, Leipsic, 1737, contains only the most important writings of the Roman jurists which have been preserved, the *Legum Mosaicarum et Romanarum collatio* (§ 66, *supra*), and some remains of earlier collections of constitutions, especially of the Gregorian and Hermogenian Code (§ 63, *supra*), but not the Theodosian Code (§ 64, *supra*), and of course not the genuine Institutes of Gaius (§ 54, note 6, page 35, *supra*), which were discovered much later, but only these according to the Visigothic paraphrase of them in the *Breviario Alariciano* (§ 68, *supra*).

2. *Jus civile Antejustinianum codicum et optimarum editionum opera societate Ictorum curatum*; præfatus est et indicem editionum adjecit, *Gustavus Hugo*, Berlin, 1815, 2 vols., contains, besides that which is in the above work by *Schulting*, the Theodosian Novels and the Theodosian Code, but without the recent discoveries in the first five books thereof by *Peyron*, *Clossius* and *Vesme* (§ 64, note 1, page 48), and also does not contain the genuine Gaius, the *Fragmenta Vaticana* (§ 66, *supra*), nor the promised preface to this collection.

3. The *Corpus juris civilis Antejustinianei consilio professorum Bonnen-sium*, *E. Boecking*, *A. Bethmann-Hollweg*, *E. Puggé*, and others, Bonn, 1835, *seq.* This is to contain the whole of the two preceding collections and a number of other matters. The following have thus far been published: *Gaii Institutiones*, by *Heffter*, and a new edition thereof, by *Göschen* and *Lachmann* (§ 54, note 6, page 35, *supra*); *Ulpiani Fragmenta*, by *Böcking* (§ 54, note 2, page 36, *supra*); *Volusii Mæciani, assis distributio*, et *Balbi Mensoris, de asse libellus* (§ 54, note 3, page 35, *supra*); *Fragmentum, Sexti Pomponii* (§ 54, note 4, page 35, *supra*); *Fragmentum veteris Icti de jure fisci* (§ 55, note 1, page 38, *supra*); *Fragmentum, Herennii Modestini* (§ 54, note 4, page 37, *supra*); *Quæ ex Dositheii Magistri, interpretamentorum libro*

¹ *Hugo*, index editionum fontium, appended to his edition of *Pauli, sentent. rec.*, Berlin, 1795, p. 123; *Haubold*, inst. lit. p. 217, *seq.*; *Clossius*, *Hermeneutik des Röm. Rechts*, Riga and Dorpat, 1829, p. 46-70. Respecting the post-Justinian sources of the Roman and Greek law, see *supra*, § 83-87.

tertio ad jus pertinent (§ 55, note 1, page 38, *supra*); and *Gaii*, Institutionum libri duo, et Fragmentum *Papiniani*, ex lege Romana Visigothorum (§ 54, note 6, page 35, *supra*), also by *Böcking*; *Julii Pauli*, receptæ sententiæ, by *Arndts* (§ 54, note 3, page 37, *supra*); The Legum Mosaicarum et Romanarum collatio, by *Blume* (§ 66, note 5, *supra*); The Vaticana Fragmenta, by *Bethmann-Hollweg* (§ 66, note 1, *supra*); *Codicis Gregoriani* et *Codicis Hermogeniani* Fragmenta (§ 63, *supra*); *Codex Theodosianus* (§ 64, *supra*); *Novellæ Constitutiones* (§ 65, note 4, page 48, *supra*); XIII. Constitutiones a. J. *Sirmondo*, editæ et *Theodosiani Codicis* Constitutiones XXII. a. *Carolo Baudi di Vesme*, nuper repertæ (§ 64, *supra*), by *Hänel*.

4. To which is now added: Jurisprudentiæ Antejustinianæ, *Huschke*, Leipsic, 1861—an extensive collection gathered from the writings of Roman jurists before Justinian, and not found in the Corpus juris civilis.

CORPUS JURIS CIVILIS.¹

§ 107. The several parts composing Justinian's law collections were originally always copied separately and afterwards were also printed separately. The whole together were at a very early period termed the *Corpus juris civilis*,² without however giving this general title to the whole collection. On the contrary each volume had and retained its own title³ till Dionysius Gothofredus gave this general title to his edition of the non-glossed and also to his third edition of the glossed Corpus juris civilis (1612); the editions of 1589 and 1604 did not bear this title. Since that time this title has become generally used in all the editions of Justinian's collections. The order in which the several parts of the Corpus juris succeed each other in the older editions wholly differs from the later, and even the old are not uniform in their arrangement. The order observed in the later editions will now be treated of.

¹ See *Spengenberg*, Einleitung, Hanover, 1817, p. 401–950: Indicis codicum et editionum Juris Justiniani prodromus. *Beck*, Leipsic, 1823; *Clossius*, Hermen., p. 29–46, p. 105.

² In contradistinction from the Corpus Juris Canonici. The title *corpus omnis Romani juris* is found in *Livy*, 3, 34; but only in relation to the twelve tables. The term corpus juris was used by Justinian in relation to all the sources of the Roman law in *Const. un. pr. C. 5. 13*. The term corpus juris civilis was frequently applied to all the Justinian law collections as early as the twelfth and thirteenth centuries. *Savigny*, Röm. Recht. im M. A., Vol. 3, p. 478, 2d ed., beginning of § 191. *Dionysius Gothofredus*, however, was the first who used it as a general title to the aggregate Justinian law collections, though the edition of *Petri ab Area Badozza* of 1593 bore the general title *Universi juris civilis* in quatuor tomos distributi *corpus*. The title Corpus juris civilis *Romani* was introduced in modern times.

³ Thus the first volume was termed *Digestum vetus*; the second, *Infortiatum*; the third, *Digestum novum*; the fourth, *Codex repetitæ prælectionis*; and the fifth, *Volume parvum*, or *Volumen* simply. See *infra*, § 115, and *Savigny*, *supra*.

I. THE INSTITUTES.

§ 108. There still exist very many manuscripts¹ of the Institutes. Among the oldest known to us is one of Bamberg of the ninth or tenth century;² one of Turin of about the same age, with a gloss of partly of the same and partly of a later age;³ one formerly of Seissenstein, likewise of the tenth century.⁴ Of the printed editions⁵ the following should be mentioned:

1. The *Editio Princeps*. In Urbe Maguntina per Petr. Schoyffer de Gernsheym, 1468.

2. The *Editio Haloandrina*, by G. Haloander, Nuremberg, 1529.

3. The *Editio Cujaciana*, by Jacob Cujas, Paris, 1585.⁶ On this of Cujas J. B. Köhler founded his edition published at Göttingen, 1772, and added to it critical notes.⁷

4. The edition of Biener.⁸

5. That of Bucher from an Erlangen manuscript.⁹

6. That of Rossberger with a German translation.¹⁰

7. The synoptical edition of the Institutes of Gaius and Justinian by Klense and Böcking.¹¹

8. The edition of Schrader, which forms the first part of *Corpus juris* edited by him in connection with several other jurists.¹²

9. The synoptical edition is the *Syntagma* of Gneist.¹³

II. PANDECTS.

1. *Florentine Manuscript.*

§ 109. Among the manuscripts of the Pandects, the Pisan or Florentine is by far the oldest,¹⁴ the most celebrated and the most valuable, though it

¹ *Eckhardt*, *hermeneutica*, edited by *Walch*, p. 143; *Schrader*, *Abhandl.* Vol. 1, p. 198. See *Roszhirt*, *Beiträge zum Röm. Recht.* Vol. 1, No. 1, wherein he speaks of three manuscripts of the Institutes at Bamberg. On manuscripts of the Institutes see *Schrader*, *prodromus*, Berlin, 1823, p. 35, *seq.*

² *Schrader*, *supra*, p. 36; *Roszhirt*, *supra*.

³ This remarkable manuscript was discovered in 1820 by Clossius in the Royal Library at Turin. See *Schrader*, *supra*, p. 55; *Savigny*, *Röm. Rechts im M. A.*, Vol. 2, p. 71, 2d ed. The Turin gloss itself is at p. 429.

⁴ It is not known where this is. See *Eckhardt*, *supra*.

⁵ *Schrader*, *civ. Abhandl.* p. 505.

⁶ See *Hugo*, *civ. Mag.*, Vol. 3, p. 238.

⁷ Köhler prepared the Institutes for the Gebauer-Spangenberg *Corpus juris*; of which his work is a reprint. On the criticism of the text of the Institutes, see *Wüstemann* in the preface to *Theophilus Paraphrase*, p. 9.

⁸ Berlin, 1812.

⁹ Erlangen, 1826.

¹⁰ Berlin, 1829.

¹¹ Berlin, 1829.

¹² See *infra*, note 4, p. 94, *seq.* The text with parallel passages appeared stereotyped, Berlin, 1836.

¹³ See *supra*, § 54, note 6, page 35.

¹⁴ It is usually said to be of the seventh century: *Mabillon*, *de re diplomat.* Lib. 5. tab. 6. All other existing manuscripts are much later. More recently, how-

contains many evidences of the ignorance of the transcribers, and several gaps in the 48th book.¹ All the other manuscripts, which for a long time were erroneously regarded as being naught but copies of the Florentine, were termed, in contradistinction from it, *manuscripta vulgata* or *codices vulgata*.² The Florentine copy was probably made in the seventh century by a Greek, at Constantinople, whence it was brought to Italy, and was found at Pisa.³ Here it remained till the year 1406, when it was taken to Florence, where it still remains.⁴ The first who collated this manuscript was Polizian, who died in 1494, which collation was continued by Bolognini (who died in 1508) and Augustin (who died in 1586).⁵ Lelio and Francis Torelli (father and son) published the first printed edition of it at Florence in 1553.⁶ This was not an exact copy, for the senseless passages were amended by the *manuscriptis vulgatis*, from which words were also taken to fill the gaps. The changes made were distinguished by various marks. The last careful collation of the Florentine manuscript was made by Henry Brenemann, and was inserted in the notes to the Göttingen edition of the Corpus juris.⁷

2. Division of the Pandects into Three Parts.

§ 110. A very old division of the Pandects, which originated in the time of the glossators, and which has been followed in nearly all the manuscripts

ever, some leaves of a manuscript contemporary with the Florentine were discovered by Pertz and published by Gaupp, entitled *quatuor folia antiquissimi alicujus Digestorum*, Breslau, 1823-4. There are also in the library of Count Schönborn of Pommersfelden, near Bamberg, several fragments of leaves of a very old papyrus manuscript, on which *Savigny* remarks in the 2d ed. *Röm. Recht. im M. A.*, § 171, note c.

¹ A voluminous history and description of this remarkable manuscript is contained in *Brenemann*, hist. Pandectar., Utrecht, 1722; with which is connected *Gebauer*, narratio de Brenemannno, Göttingen, 1764. On the controversies respecting this manuscript, see the writings cited in *Haubold*, inst. hist. dogm. § 274, and *Thibaut*, jur. Nachlass, Vol. 2, p. 404.

² *Brenemann*, *supra*, lib. 3, c. 2; *Spangenberg*, Einl. p. 405, *seq.*, p. 490, *seq.*, and especially *Savigny*, 2d ed. Vol. 2, § 54, Vol. 3, § 164, *seq.*

³ *Odofredus*, ad L. In rem actio D. de rei vind; *Bartolus*, in rubr. D. sol. matr. According to a common opinion formerly entertained it was discovered at Amalfi, and was presented by the emperor Lotharius II. to the city of Pisa: *Panciroli*, de claris legum interpretibus, Lib. 2. cap. 3. 13. But this supposition has been disproved by Asti in the year 1722, and after him by Guido Grandi in 1727. It is no longer believed: *Hugo*, Gesch. des R. R. seit Justin. p. 451; *Savigny*, Vol. 3, p. 92, 2d ed.

⁴ When it was brought to Florence it was rebound in purple, with gilded backs and edges, placed in a richly-ornamented casket, and preserved in the old palace of the free city as a holy relic, and shown to curious travellers by the monks in uncovered heads and with glowing hearts: *Brenemann*, *supra*, p. 65.

⁵ *Haubold*, inst. tit. § 42, No. 105; *Hugo*, *supra*, p. 233.

⁶ *Hugo*, *supra*, p. 238.

⁷ *Spangenberg*, Einl. p. 448, *seq.*

and editions of them since that period till into the sixteenth century, is that into three parts or volumes, the first of which was termed *Digestum vetus*; the second, *Infortiatum*; and the third, *Digestum novum*. The *Digestum vetus*, or the first (oldest) part, embraced Lib. 1 to Lib. 24, title 2, inclusive; the *Digestum novum*, or the last part of the Pandects, originally began with the words *tres partes* in fr. 82. Dig. 35. 2, and extended to the end of the Pandects. Originally at Bologna they only had these two parts, the first and last. Subsequently the middle part was obtained,¹ when they separated from the then *Digestum novum* its beginning, namely, that piece commencing with the words *tres partes* and extending to the end of the 38th book, and added it, as the connection of the subject matter therein contained required, to the middle part of the Pandects. From this enlargement the second part received the name *Infortiatum* (it is never termed *Digestum infortiatum*). From that time the *Infortiatum* embraced from Lib. 24. tit. 3, inclusive, to Lib. 38, inclusive, and the *Digestum novum* from Lib. 39, inclusive, to the end of the Pandects.²

3. Variations between the Editions of the Pandects.

§ 111. The printed editions of the Pandects differ greatly from each other in their readings. They are divided into three principal classes,³ and follow either—

1. The *lectio Florentina s. litera Pisana* (§ 109, *supra*), i. e., those readings which are in the Florentine manuscript;⁴ or,

2. The *lectio vulgata s. Bononiensis*, i. e., the revised text which the glossators formed out of the Florentine manuscript and other original copies of the Pandects by critical selections, and which was subsequently inserted in all the later manuscripts;⁵ or,

¹ This part was never wholly lost in Italy, as many have supposed. See *Bartolus*, in rubr. tit. D. soluto matrimonio (with which the *Infortiatum* commences), where he says “hoc volumen (*Infortiatum*) nunquam fuit amissum. Semper enim fuit totum volumen pandectarum Pisis et adhuc est.” The middle part was not originally in Bologna.

² For the history of this remarkable division of the Pandects, see *Odofredus*, in Dig. vetus L. *jus civile* 6 de just. et jure; in *Infortiatum*, initio; in *Infortiatum*, L. 92, ad L. Falc. verb. *tres partes*; in Dig. novum, initio; *Savigny*, Röm. Recht. im M. A., Vol. 3, p. 422, *seq.*, 2d ed. For Mackeldey's views, see *Thibaut*, *Nachlasz*, Vol. 2, p. 417.

³ *Thibaut*, *Versuche*, Vol. 1, No. 14; *Spangenberg*, Einl. p. 425; *Savigny*, Vol. 3, § 164, *seq.*, 2d ed.

⁴ No edition contains the pure Florentine text, not even that of Torelli (§ 109, *supra*); but most of it has been embodied in the editions of *Russard* (Lyons, 1521), of *Pacius* (Geneva, 1580), of *Charondas* (Antwerp, 1575), of *Contius* (Lyons, 1571, 1581), of *Gebauer-Spangenberg* (Göttingen, 1776), and of *Kriegel* (Leipzig, 1829).

⁵ *Savigny*, Vol. 2, p. 147; Vol. 3, p. 424–449; Vol. 2, § 54; Vol. 3, § 168–177, 2d ed. The *lectio vulgata* is found in all editions earlier than Polizian's and Bolognini's collations. After these the texts begin to be mixed. *Thibaut*, *Versuche*, Vol. 1, p. 293.

3. A *lectio mixta*, i. e., a text formed by a critical selection out of the Florentine and Vulgate readings. A highly-celebrated edition of the last kind is the Haloandrian, published by Gregorius Haloander at Nuremberg in 1529 in three vols. 4to, wherefore it is also termed *lectio Norica*. Haloander used for this edition, not the Florentine manuscript itself, but Polizian's and Bolognini's collations of it.¹

III. THE CODE.

§ 112. Many manuscripts of the Code are still preserved,² but none of them equals the Florentine manuscript of the Pandects in age, celebrity or completeness. During the dominion of the German tribes in Italy the copies of the Code, as they were designed only for practice, became greatly mutilated. The last three books were wholly excluded, because, as they only contained public law, they were deemed to be inapplicable to Italy, and in the first nine books many single constitutions were omitted.³ Hence lectures were usually read only on the first nine books, and they alone were printed only in the older editions. Subsequently the last three books, which were separated from the first nine, were inserted in the *Volumen parvum* (§ 115, *infra*). Among the editions of the Code which deserve to be especially mentioned are the *editio Haloandrina*, by Gregory Haloander, 1530; that by Contius, Paris, 1562; that by Russard, Antwerp, 1567, and that by Charondas, Antwerp, 1575. All these contain the whole twelve books.⁴ In the Gebauer-Spangenberg edition of the Corpus juris there are noticed besides the readings of the last four mentioned editors also those of the Göttingen manuscript of the Code. Beck's edition is better; but the best⁵ edition of the Code is that of Herrmann in the Kriegel edition of the Corpus juris.

IV. NOVELS.

§ 113. The Novels from the beginning had neither an internal nor external coherence; many of them were discovered at a later period and embodied in the various editions. Hence the editions of the Novels differ more than any other part of the Corpus juris.⁶ The various editions cannot well be classi-

¹ Gothofred's editions, which were for a long time erroneously supposed to be *editiones vulgatæ*, are mixed editions, and follow principally the *lectio Florentina*.

² *Eckhardt*, hermeneutica, edited by Walch, p. 155; *Spangenberg*, Einl. p. 547.

³ *Spangenberg*, p. 128; *Savigny*, Vol. 3, p. 486, 2d ed.

⁴ On the older editions see *Spangenberg*, p. 463.

⁵ See p. 62, *supra*, note 3.

⁶ On the existing manuscripts of the Novels see *Eckhardt*, hermeneutica juris ed; Walch, p. 161; *Spangenberg*, p. 561. The two most important manuscripts of the collection of one hundred and sixty-eight Novels are in Venice and in Florence. The manuscript which during the thirty years war was taken from Heidelberg to Rome is only a copy of the former, and the manuscript in Bologna is a copy of the Florentinian. There is also an index of rubrics of the one hundred and sixty-eight Novels in Paris, which Cujas published in Latin in his *expos. Novellar.* and Heimbach published it in the primitive Greek in the *Annal.* T. 2. p. 237.

fed; only the labors of each editor can be stated.¹ Deserving of particular mention are:

1. The first printed editions of the Novels: *Rome apud sanctum Marcum*, 1476, fol., which contains the ancient collection of the glossators in the *versio vulgata*, consisting of ninety-seven Novels (§§ 80, 81, *supra*), and also the last three books of the Code, the Institutes and the *libri feudorum*.

2. The first critical Greek edition with a new Latin version is that of *Gregory Haloander*, Nuremberg, 1531, fol. Soon after another edition was published at Basle, 1541, fol., which was based on the Greek text of Haloander, but contains many arbitrary emendations. In the Latin text the *versio Haloandrina* and the *vulgata* are placed side by side.

3. The edition of *Henry Scrimger*, Geneva, 1558, which furnishes only the Greek text. It contains twenty-five more Novels than Haloander; but it omits four which the latter contains.² A Latin translation of the Novels omitted by Haloander and published by Scrimger, as also the supplying of the gaps in the Haloander edition and the emendation of the *vulgata*, were furnished by *Henry Agylæus*, Cologne, 1560, and Basle, 1561. More complete than the preceding are—

4. The editions of *Contius*, partly in Latin and partly in Greek, with a new arrangement of the order of the Novels³ made by him, some editions glossed and others unglossed, Lyons, 1559, 1562, 1565, 1566, 1571, 1576, 1579. The edition of 1566 was reprinted at Lyons 1581.

5. The Latin text of *Contius* was at a later period embodied in the Gothofred edition. Simon Van Leeuwen also inserted the Greek text in his edition of Gothofred's *Corpus juris civilis*, Amsterdam, 1663, fol.

6. *J. F. Hombergk zu Vach*, Marburg, 1717, issued the Grecian Novels as they were in the previous editions, with excellent critical annotations and a new Latin translation. Where he found no Greek text he gave the Latin text as he found it.

7. The *Gebauer* and *Spangenberg* *Corpus juris*, which contains the text of Leeuwen and the entire Hombergk translation with its supplements and most important various readings.

8. At a later period Savigny published two Novels (62 and 104) which

¹ See *Thibaut*, *Vers.*, Vol. 1, No. 14; *Spangenberg*, p. 470; *Biener*, *Gesch. der Novellen*, Berlin, 1824, p. 317. The latter work contains the most comprehensive and fundamental investigations of the Novels. Valuable contributions to the literary history of the Novels were made at a more early period by *A. W. Cramer*; firstly, by his *Analecta litt. ad hist. Novellar.*, Kiel, 1794, and, secondly, by two articles in *Hugo's civil Mag.* Vol. 3; *Weis*, *Histor. novell.*, Marburg, 1800; *Savigny*, Vol. 3, 2d ed. § 181-184.

² Haloander's edition is based on the Bolognese and Scrimger's on the Heidelberg manuscript.

³ The later unglossed editions of the year 1571 are based on the order of the Greek collection, according to the Parisian index. Notwithstanding which the Novels are divided into nine collations.

had not previously been printed in a complete state, and Biener published a constitution of Justinian from a Viennese manuscript which previously was wholly unknown, and C. J. A. Kriegel the Novel 87,¹ and Heimbach the Novels 166, 167 and 168 more fully complete than they previously had been.

9. *Beck's* edition of the Corpus juris contains the collection of the one hundred and sixty-eight Grecian Novels more fully than previously, and also the Hombergk translation with less changes and the Latin *liber Authenticorum* wholly distinct from the collection.

10. *Osenbrüggen* in the Kriegel edition of the Corpus juris gives the Greek text, as also the Hombergk translation much improved, but without a marked distinction between the Latin and Greek collection.

11. The truest restoration of the Latin collection of the one hundred and thirty-four Novels as the glossators found them, and so far as they only contain a translation of the Greek originals, is the edition of G. E. Heimbach, Leipsic, 1851.

APPENDICES TO THE CORPUS JURIS CIVILIS.

§ 114. Besides Justinian's law books and collections already enumerated there are in most of the editions of the Corpus juris civilis several appendices of very different kinds which were appended partly by the glossators and partly by more modern editors. They contain :

1. The thirteen edicts of Justinian, which are in fact Novels (note 3, p. 63, *supra*).

2. Five constitutions of Justin the younger.

3. Five constitutions of Tiberius the younger, of which the fourth is lacking.

4. Some other constitutions of Justinian,² Justin and Tiberius.

5. The one hundred and thirteen novels of the emperor Leo (end of § 84, *supra*).

6. A constitution of Zeno *de novis operibus*.

7. A number of constitutions of different emperors bearing the title *Imperatoris constitutiones*.

8. *Canones sanctorum et venerandorum Apostolorum*.

9. The *libri feudorum*, a collection of Lombardian feudal law customs and imperial feudal laws of the twelfth century, which still form the chief source of the German common feudal law.³

10. Several constitutions of Frederick II., from which eleven of the *Authenticæ Fridericianæ* in the Code were extracted (§ 92, *supra*).⁴

¹ *Kriegel*, *symbolæ criticæ ad Novellas Justiniani*, Leipsic, 1832.

² The most remarkable of them is the *Sanctio pragmatica*; *Pro petitione Vigilli*. (See *supra*, § 88, note 5.)

³ See *Eichhorn*, *Rechtsg.* Vol. 2, § 278; *Pastz*, *librorum juris feudalis Longobardici*, Göttingen, 1805; *Dieck*, *Literärgeschichte des Longobardischen Lehnrechts*, Halle, 1828; *Laspeyres*, *über die entstehung und älteste Bearbeitung der libri feudorum*, Berlin, 1830.

⁴ The glossators formed the *collatio decima Novellarum* chiefly out of the *libri feudorum* and these constitutions: *Savigny*, *Gesch. im M. A.*, 2d ed. p. 520, seq.

11. Two constitutions of Henry VII. (*Extravagantes*), respecting the crime of injury to majesty (*crimen læsæ majestatis*), and rebellion, of the year 1312.

12. The *liber de pace Constantiæ*, which contains the treaty of peace of Costnitz, which the emperor Frederick I. made with the allied towns in Lombardy.

Besides the foregoing, several editions (*e. g.*, that of Van Leeuwen) contain also the fragments of the Twelve Tables, the Prætorian Edict and of the works of several Roman jurists, especially of Ulpian, Paul and Gaius; but only a small part of these is genuine. In the edition of *Petrus ab Area Baudouza* (Lyons, 1593, P. IV. p. 935), even the golden bull of Charles IV. has been embodied.

EDITIONS OF THE ENTIRE CORPUS JURIS.

I. Glossed.

§ 115. The editions of the entire Corpus juris civilis may be divided into glossed and unglossed.¹

I. The glossed editions generally consist of five volumes. The first contains the *Digestum vetus*; the second the *Infortiatum*; the third the *Digestum novum* (§ 110, *supra*); the fourth embraces the first nine books of the Code; and the fifth, which generally bears the title *Volumen legum parvum*, and often simply *Volumen*, contains the last three books of the Code, the Novels, the book of feuds and the Institutes.² The best of the glossed editions are:

1. That published at Lyons by the brothers *Senneton*, 1549, 1550, in 5 vols. fol.³

2. That of *Ant. Contius* at Paris, 1576, in 5 vols. fol.

3. The Corpus juris civilis glossatum ex recens., *Dionys. Gothofredi*, first published at Lyons, 1589, 6 vols. fol., without the common title, and then the same in 1604, and finally, in 1612, enlarged and improved with the common title.

4. The most esteemed, newest glossed edition is a reprint of the Gothofred edition, with additions from the notes of Cujas, edited by *Joannis Fehii* at Lyons, 1627, 6 vols. fol.⁴

¹ On the various editions of the Corpus juris civilis and the several parts thereof, see *Sammet*, Hermeneutik, § 12; *Spangenberg*, Einl. p. 645, *seq.*

² Formerly each of these five volumes was bound in a different color, which seemed to have some relation to its contents: *Spangenberg*, Einl. p. 127.

³ This edition is remarkable because the *Brachylogus* (§ 89, *supra*) was for the first time printed in it, as also *Julian*, epitome Novellarum, according to a good manuscript (§ 81, *supra*).

⁴ Usually is classed among the better glossed editions also that of *Baudouza*, Lyons (in some copies, Geneva), 1593, and with a new title page, from the year 1600 on, 4 vols. quarto. See *Hugo*, Gesch. des Röm. Rechts seit Justinian, 3d ed. p. 316.

II. *The Unglossed.*

§ 116. The unglossed editions are subdivided into those which contain critical and explanatory notes of later jurists, and into those which only contain the text.

A. The best editions with notes¹ are:

1. That of *Ludw. Russard*, bearing the title *Jus Civile*, Lyons, 1560, 1561, in 2 vols. fol., and afterwards at Antwerp, 1566, 1567, and again at Antwerp, 1569, 1570, in 7 vols. 8vo.²

2. That of *Ant. Contius*, Paris, 1562, in 9 vols. 8vo, Lyons, 1571, 15 vols. 12mo, and again in 1571, with a new title page.³

3. That of *Charondas*, Antwerp, 1575, in 2 vols. fol., containing a selection of the notes to Russard's and to Contius' editions.

4. That of *Julius Pacius*, 1580, fol., and then in the same year in 8vo, both in Geneva.

5. That of *Dionysius Gothofredus*,⁴ Lyons, 1583, 4to; reprinted, Frankfort, 1587;⁵ 2d edition, improved (*editio secundæ prælectionis*), Lyons, 1590, in 2 vols. fol.; the 3d edition, improved, Geneva, 1602, 4 vols. fol.; the 4th edition, Lyons, 1607, 2 vols. fol., Geneva, 1614, 4to, *ibid.* 1615, fol. The fifth and most complete edition, with the notes of Dionysius Gothofredus, is that edited by his son, Jacob Gothofredus, Geneva, 1624, fol. This has been frequently published since; particularly the edition of *Antonius*, Lyons, 1652 and 1662, 4to.

6. One of the best and most elegant editions, with notes, is that prepared by *Simon Van Leeuwen*, from the last edition of Gothofredus, Amsterdam, 1663, fol. It contains, besides Gothofredus' notes, the annotations of many other jurists, and has been reprinted, Frankfort, 1663, Leipsic, 1705, 1720 and 1740, in 2 vols. 4to.⁶

¹ Only the editions under Nos. 5, 6 and 8 have explanatory notes.

² *Russard*, in his edition, has embraced many passages between the marks || ||, to show that they were not contained in all the manuscripts.

³ In this edition only the Institutes and Code were published by Contius. *Spangenberg*, Einl. p. 308.

⁴ The selection of the text is bad, and the notes are full of useless repetitions and obscure objections (*immo*), taken from passages apparently contradictory. See *Struven*, Gothofredi, *immo*, Frankfort, 1695. Nevertheless Gothofredus's editions are very useful, because of the many parallel passages, of the references to the sources and the Basiliks, and because of the extracts from the best jurists, which they contain. There are, however, editions of Gothofredus, without notes, which are bad. See *Gobauer*, *Narratio de Brenckmanno*, Göttingen, 1764, § 29-35; *Thibaut*, *Ver-suche*, Vol. 1, No. 14.

⁵ The Frankfort reprint of 1663, in quarto, as also that of 1688 (with four joined hands on its title page), are not deserving of the praise which is usually given to them.

⁶ Respecting the reprint of 1720, see *Wieling*, *jurisp. rest.* P. 2, p. 210. The reprint of 1740 is said to be good.

7. The critical edition commenced by *G. O. Gebauer*, and completed, after his death, by *G. A. Spangenberg*. The 1st part, Göttingen, 1776; the 2d part, 1797, 4to. It contains many various readings, and also critical notes.¹

8. What can yet be done for a critical edition with explanatory notes, Schrader has not only shown extremely well,² but he has been engaged on such an edition for a long time, assisted by Clossius, Tafel and Mayer.³ Unfortunately only the first volume, containing the Institutes, has yet appeared.⁴

9. Besides these, two smaller editions of the *Corpus juris civilis* have been published at Leipsic, which only contain the text and the most important variations; one of them by *J. L. W. Beck*,⁵ and one that was begun by the brothers *C. J. A. Kriegel* and *C. M. Kriegel*, who furnished the Institutes and Pandects, and continued by *E. Herrman*, who furnished the Code, and completed by *E. Osenbrüggen*, who edited the Novels.⁶ The two latter jurists having performed much more than their predecessors promised⁷ makes the Kriegel edition very valuable.⁸

B. The most important editions without notes are:

1. The reprint of the Haloander review of the Roman law books, Hervage, Basle, 1541, 2 vols. fol., of which there is a reprint by Thomas Guarinus, 1570, 3 vols. fol.

2. The Elzevir edition, Amsterdam, 1664, with the well-known misprint, in the inscription to the fifth book *Pars secundus*, then in 1681, 1687, and the most correct in 1700, 8vo.

3. The *Corpus juris academicum* of *Freiesleben*, Altenburg, 1721, 8vo, Basle, 1734, 4to, and subsequently frequently at both places. The Altenburg editions contain merely the text. The Basle editions also give parallel passages.

4. The stereotyped edition of *J. L. Beck*, published by *C. Knobloch*, Leipsic, 1829–1837, small folio; it contains the text of the above-mentioned

¹ *Spangenberg*, Einl. p. 451; *Thibaut*, jur. Nachlasz, Vol. 2, p. 436.

² *Schrader*, Abhandl. aus dem Civilrechte, Vol. 1, No. 6.

³ Fuller information thereon is given by the *Prodromus corporis juris civilis*, edited by *Schrader*, *Clossius* and *Tafel*, Berlin, 1823. This prodromus contains, from page 273 on, a specimen of these new critical labors, namely, the Proœmium Institutionum and the Tit. I. de nuptiis and de codicillis.

⁴ *Corpus juris civilis*, *E. Schrader*, In operis societatem accesserunt, *T. L. F. Tafel*, *G. F. Clossius* et *C. J. C. Maier*, Vol. I., Berlin, 1832.

⁵ *Corpus juris civilis*, edid. *J. L. G. Beck*, Leipsic, 1825–1836, 4 vols. 8vo.

⁶ *Corpus juris civilis*, edited by *A. & M. Kriegel*, *Herrmann* and *Osenbrüggen*, Leipsic, 1828–1837, 4to.

⁷ Respecting the Code, see end of § 112, *supra*, and on the Novels, see § 113, 10, *supra*.

⁸ This edition commends itself by its references in the Institutes to *Gaius* and the Basiliks, and in the Pandects to the three masses of fragments and their order (§ 72, *supra*), and to a greater extent than heretofore to the *Partes Digestorum* (§ 74, *supra*).

Beck edition. Finally, taken as a whole, there is a very good German translation of the *Corpus juris civilis*, edited by Otto, Br. Schilling and Sintenis, Leipsic.¹

Improved Editions and Chrestomathies.

§ 117. Besides the editions of the *Corpus juris* already enumerated there are others which are termed *editiones reconcinnatæ* (improved). These are those wherein the text of the Pandect fragments and constitutions which from their matter should be connected has been selected from the scattered passages and arranged by the editors in a systematic order. To these belong:

Eusebii Begeri, *Corpus juris civilis reconcinnatum in tres partes distributum, cum præf., L. B. De Senkenberg*, Frankfort and Leipsic, 1767, 1768, 3 vols. 4to; *Pothier*, *Pandectæ Justinianæ in novum ordinem digestæ, cum legibus Codicis et Novellis*, Paris, 1748–52; subsequently at Lyons, 1782, and lastly at Paris, 1818–21, 3 vols. fol. Chrestomathies or selections of the most important passages from the sources of the Roman law have been made by Domat,² Seidensticker,³ Hugo,⁴ Cropp,⁵ Savigny,⁶ Haubold,⁷ Pernice,⁸ Fürstenthal, Clossius,⁹ Hermann,¹⁰ Blondeau,¹¹ Fein.¹²

¹ The *Corpus juris civilis* translated into German by an association of jurists, and edited by C. E. Otto, B. Schilling and C. F. F. Sintenis, Leipsic, C. Focke, 1830–1833, 7 vols. 8vo.

² Domat, *Legum delectus ex libris Digestorum et Codicis ad usum scholæ et fori*, Paris, 1700, 4to, Amsterdam, 1703, 4to. Also in his *Lois civiles dans leur ordre naturel*, Paris, 1713, 1723, 1745, 1756, 1767, 1777.

³ J. A. L. Seidensticker, *Corpus juris civilis in chrestomathiam contractum*, Göttingen, 1798, 8vo.

⁴ Hugo, *Versuch einer Chrestomathie von Beweisstellen*, Berlin, 1802, 1807, 1820.

⁵ Cropp, *loci juris Romani selecti*, Heidelberg, 1815, 8vo.

⁶ Without a special title.

⁷ Haubold, *doctrinæ Pandectarum lineamenta*, Leipsic, 1820, 8vo.

⁸ L. Pernice, *Grundriss der Geschichte, Alterthümer und Institutionen des Röm. Rechts*, 2d ed., Halle, 1824.

⁹ J. A. L. Fürstenthal, *Corpus juris civilis, canonici, germanici reconcinnatum*, 3 vols., Berlin, 1828, 1829, 8vo. And his *Corpus juris academicum systematice redactum*, Vol. 1, Berlin, 1829, 8vo, or Chrestomathies, containing the principal passages cited in Thibaut's and Wening-Ingenheim's compendiums.

¹⁰ L. Hermann, *Sammlung von Beweisstellen* to this (Mackeldey's) Handbook, 3 vols., Gießen, 1832, 8vo.

¹¹ H. Blondeau, *Chrestomathie ou choix de textes pour un cours élémentaire du droit privé des Romains*, Paris, 1830, 4 nos. 1830–1833, 8vo.

¹² E. Fein, *Chrestomathie der Beweisstellen zu Puchta's Pandekten*, 1 vol., Zurich, 1845, 8vo.

SIXTH DIVISION.

OF THE METHODS OF TEACHING AND THE LITERATURE OF THE
ROMAN LAW.

THE METHODS IN GENERAL.

§ 118. The scientific treatment of positive law, and consequently of the Roman law, depends partly on exegesis or the grammatical critical explanation of the sources of the law as we have received them in writing, partly on dogmatics or the systematic exposition and development of the existing law derived from the sources, and partly on the history of the law or guide as well to the sources of the law as to the rise and gradual development of the distinct doctrines thereof (§ 18, *supra*). Each of these modes of treating positive law has its especial value and benefit, and neither one can wholly dispense with the other. Exegesis of the sources forms the first and principal basis for the scientific treatment of positive law. Dogmatics teach us the actual existing law in its whole extent and practical applicability. Legal history gives the historical and political reasons of the actual existing law, and thus shows us its true meaning and spirit. Exegesis, dogmatics and legal history should therefore always be combined with each other; but, according to the especial purpose which is sought to be attained by books or by oral lectures on positive law, one or the other may predominate and may be regarded as the chief object; and it is only in this relation that the distinction usually made between exegetical, dogmatical and historical writings and lectures is important.¹

THE METHOD OF THE GLOSSATORS.

§ 119. The glossators pursued in their writings as well as in their lectures on the Roman law the exegetical method chiefly. They illustrated the text of Justinian's law books, which formed the basis of their writings and lectures, partly by condensed summaries of the contents of the several titles (*summæ*), and partly by explanatory annotations on the several passages (*glossæ*), which, when extended as a running commentary on the whole title of the law book, was also termed *apparatus*.² This method continued to be followed for a long time afterwards in Italy and France as well as in Germany, after the Roman law was there introduced, and was taught in the newly-instituted universities.

LATER METHODS.

§ 120. Towards the end of the sixteenth and especially in the seventeenth century compendiums of the Pandects and afterwards even of the Institutes

¹ Respecting the various methods of teaching the Roman law, see *Haubold*, *instit. jur. Rom.*, edited by *Otto*, § 22-34; *Seuffert*, *Erört.* Part 1, No. 1, and the works cited § 18, *supra*, note 2.

² *Spangenberg*, *Einl.* p. 255; *Savigny*, *Gesch. des R. R.* § 208, *seq.*, Vols. 4 and 5, 2d ed.

were written, which prepared the way for the dogmatical method of instruction. In all compendiums of the Roman law, in the arrangement of the several doctrines, the order of the titles of the Institutes and Pandects (the so-termed legal arrangement, *secundum ordinem Institutionum et Digestorum*) was at first pursued; and according to this order the lectures were for a long time delivered in the German universities.¹ Nigh all the modern compendiums of the Institutes and Pandects, however, pursue a self-chosen, systematic order; but they differ greatly from each other in their form and contents. The history of the Roman law is at present sometimes taught in connection with the Institutes, and sometimes treated on separately.

IMPORTANCE OF EXEGETICAL STUDY.

§ 121. In our day the historic-dogmatical lectures on the Roman law are the most customary. They are undoubtedly the best adapted to the first study of the law; but it is to be regretted that this gradually causes the neglect of the exegetical lectures on the sources themselves, because most of the students incomprehensibly believe them to be unnecessary and superfluous. This remarkable negligence of Hermeneutics and Exegesis has as its sad and natural consequence the still greater growing neglect of the study of the sources. And naught could more be desired than the reintroduction of the custom of exegetical lectures, at least on the text of the Institutes and on select passages of the other parts of the Corpus Juris and likewise on Ulpian and Gaius, as no lecture is better adapted to introduce the novice to the study of the sources and to advance him than fundamental Hermeneutics combined with exegetical lectures.² But the study of the sources of the law is in our science, as in all others, the only one which gives a true and proper culture, which protects us from spiritless repetition and makes us independent of other guidance.

SELECTED LITERATURE OF THE ROMAN LAW.

§ 122. We have already remarked in different places, especially in the 55th division, respecting the sources of the Roman law which have descended to us. It only remains for us to mention the best ancient and modern writings on the Roman law.

I. BIBLIOGRAPHICAL WORKS.

Martini Lipenii, bibliotheca realis juridica. Francof., 1679, fol. post. *Frid. Glieb. Struvi et Gottlob Aug. Jenichii* curas multis accessionibus aucta. Tom. I. et II., Lips., 1757, fol. To which there are the following supplements: 1. *Frid. Aug. Schott*, Ibid. 1775, fol. 2. *Ren. Car. de Senckenberg*, Ibid. 1789, fol. 3. *Lud. Gottfr. Madita*, Vratislav., 1817-1830, fol.

Duc. Gottl. Struvi, bibliotheca juris selecta. Jenæ, 1703. Ed. 8vo, cura *Chr. Gottl. Buderi*. Jenæ, 1756, 8vo.

¹ *Hugo*, Encyclopædie, 8th ed. p. 298; *Falck*, Juristische Encyclopædie, § 91.

² *W. F. Clossius*, Hermeneutik des Röm. Rechts, Leipsic, 1831.

Camus, bibliothèque choisie des livres de droit; back of his lettres sur la profession d'avocat. Paris, 1772, 1775, 4me. edition, par *Dupin*. Paris, 1818, 8vo.

E. Chr. Westphal, systematische Anleitung zur Kenntniss der besten Bücher in der Rechtsgelahrtheit, 3d ed., Leipzig, 1791, 8vo.

Heinr. Johann. Otto König, Lehrb. der allg. jurist. Literatur. Zwei Theile. Halle, 1785, 8vo.

Joh. Sam. Ersch, Literatur der Jurisprudenz und Politik. Neue fortges. Ausgabe von *Joh. Chr. Koppe*. Leipzig, 1823, 8vo.

F. W. L. B. ab Ulmenstein, bibliotheca selecta juris civilis Justinianei, ante-Justinianei et post-Justinianei. Berlin, 1821-1823, 3 T., 8vo.

H. Th. Schletter, Handb. der jur. Literatur. Grinma, 1843, 8vo.

O. A. Walther, Handlexicon der jur. Literatur des neunzehnten Jahrhunderts. Weimar, 1854, 8vo.

See also *Hugo*, Geschichte des R. R. seit Justinian, 3d ed. pp. 58, 59.

II. LEXICOGRAPHICAL WORKS.

Barn. Brissonius, de verborum, quæ ad jus civile pertinent, significatione. First edition, Lugd., 1559, fol., and various others. The last edition edited by *Jo. Gottl. Heineccius*, with preface by *Justi Henn. Boehmer*. Halæ Magdeburg, 1743, fol.

Jo. Wunderlich, additamentorum ad *B. Brissonii* opus de verborum significatione volumen. Hamburg, 1778, fol.

Andr. Guil. Crameri, supplementi ad *B. Brissonii* opus de verborum significatione spec. I. Kilie, 1813, 4to.

R. P. Vicat, Vocabularium juris utriusque. Lausanne, 1759, 3 vols. 8vo. Naples, 1760, 4 vols. 8vo (extracted from Brissonius). With regard to Brissonius and the later editions and enlargements of his work see

H. E. Dirksen, in the Rheinische Museum für Jurisprudenz, Vol. 2, p. 42, and in his System der Juristischen Lexicographie. Leipsic, 1834, p. 30, et seq.

Dirksen, Specimen Thesauri latinitatis fontium Juris Civilis Romanorum. Leipsic, 1834; and his Manuale latinitatis fontium Juris Civilis Romanorum Thesauri latinitatis epitome; nine numbers. Berlin, 1837-1839.

H. G. Heumann, Handlexicon zum corpus juris civilis. Jenæ, 1846. 2d ed., Jenæ, 1851, 8vo.

III. HERMENEUTICAL WORKS.

Val. G. Forsteri, Interpres, sive de interpretatione Juris. Wittenberg, 1613, Altenburg, 1710. And in *E. Otto's* Thesaurus Juris Rom., Vol. 2, p. 945-1068.

F. Rapolla, de Icto, sive de ratione discendi interpretandique Juris Civilis. Naples, 1726, 8vo, 2d ed., Ibid. 1766. Translated into German with notes by *Griesinger*. Stuttgart, 1792, 8vo.

Ch. H. Eckhardt, Hermeneutica Juris. Leipsic, 1750; 2d ed., with notes by *C. F. Walch*, 1779; 3d ed., with notes by *C. W. Walch*, 1802, 8vo.

H. G. Wittich, Principia et subsidia Hermeneuticæ Juris. Göttingen, 1799, 8vo.

J. G. Sammet, Hermeneutik des Rechts, edited by *Born*. Leipsic, 1801, 8vo.

Thibaut, Theorie der logischen Auslegung des Römischen Rechts. (Principles of logical Interpretation of the Roman Law.) Altona, 1799; 2d ed., 1806, 8vo.

W. F. Clossius, Hermeneutik des Römischen Rechts und Einleitung in das Corpus Juris Civilis im Grundrisse, mit einer Chrestomathie von Quellen. (Hermeneutics of the Roman Law and Introduction to the Corpus Juris Civilis, with select Extracts.) Riga and Dorpat, 1829. Leipsic, 1831, 8vo.

Thibaut, Hermeneutik und Kritik des Römischen Rechts, in his juridical remains edited by *C. I. Guyet*, Vol. 2. Berlin, 1842, p. 363, seq.

Joh. Jak. Lang, Beiträge zur Hermeneutik des Römischen Rechts. Stuttgart, 1857, 8vo.

IV. EXEGETICAL WORKS.

A. ON THE WHOLE CORPUS JURIS.

To this class belong chiefly the Glossa Accursiana (§§ 90, 115, *supra*), the notes of later jurists, especially of Dionysius Gothofredus to his edition of the Corpus Juris (§ 116, *supra*), and properly all the works of Cujas, which contain the most valuable exegetical observations on almost all the difficult passages of the Corpus Juris. The most complete editions of his works are the following:

J. Cujacii, Opera omnia. Edited by *A. Fabrot*. Paris, 1658, 10 vols. fol.

J. Cujacii, Opera omnia, studio et diligentia *Liborii Rani*. Naples, 1722–1727, 11 vols. fol.; 2d ed. by *D. Albanensis*. Ibid. 1757 or 1758.

J. Cujacii, Opera omnia. Venice and Modena, 1758–1783, in 11 vols. fol. (This is a mere reprint of the Naples edition, differing only in the number of pages.)

The following book is indispensable to a complete use of Cujas' works:

D. Albanensis, Promptuarium universorum Operum Jac. Cujacii. 2 vols. fol. It contains the most precise references to the illustrations of Cujas on Justinian's and other law sources. The original edition was published at Naples, 1763, and is adapted only to the two Naples editions of Cujas' works. A reprint of this Promptuary appeared at Modena in 1795, which was arranged to agree with the Venice and Modena edition of Cujas, and is therefore suitable for that edition alone. (See, respecting this, *Thibaut*, Civilistische Abhandlungen, p. 248; *Hugo*, Civilistisches Magazin, Vol. 6, p. 189; *Thibaut*, in the Archiv. für Civilistische Praxis, Vol. 13, pp. 193, 452, *seq.*)

B. ON SINGLE PARTS OF THE CORPUS JURIS.

1. *Institutes*.

Fr. Balduini, Commentarius ad Instituta. Paris, 1546, fol. Ibid. 1554, fol. Frankfort-on-the-Main, 1582, fol.

Jac. Cujacii, Notæ priores et posteriores in Institutiones. Cologne, 1592, and in *Ranius*' edition of Cujas, Vol. 1, p. 1.

Fr. Hotomani, Commentarius in Institutiones. Basle, 1560, fol. Ibid. 1659. Lyons, 1588, and in his works, Vol. 2, p. 1.

Jani e Costa, Commentarius. Paris, 1659, 4to, with *Theod. Marcellius*' and *M. A. Muretus*' Commentaries, edited by *J. Van de Water*. Utrecht, 1714, 4to. Leyden, 1719 and 1744, 4to.

H. Vultei, Commentarius. Marburg, 1598, 4to. Ibid. 1600. Ibid. 1613.

Paul Voet, Commentarius in IV. libros Institutionum in 2 parts. Utrecht, 1668, 4to.

Edm. Merillii, Commentarius in IV. libros Institutionum; opera et studio, *Claudii Mongin*. Paris, 1654, 4to.

Arnoldi Vianii, Commentarius. Amsterdam, 1642, 4to, and many editions since, lastly with notes by *Heineccius*. Leyden, 1726, 4to. Ibid. 1767.

J. Heppii, Commentatio succincta ad Institutiones. Frankfort, 1693, 4to, and many later editions; the last, Ibid. 1746.

E. Ottonis, Commentarius et notæ criticæ ad Institutiones. Utrecht, 1729, 4to, with a preface by *C. F. Harpprecht*. Frankfort and Leipsic, 1743, 4to; afterwards edited by *J. R. Iselinus*. Basle, 1760, 4to.

Imperatoris Justiniani Institutionum libri IV. Commentario perpetuo instruxit, *Ed. Schrader*. Berlin, 1832, 4to. (See § 116, *supra*, note.)

2. *Pandects.*

Odofredi, Commentarii in Digesta. Venice, 1480, fol. Lyons, 1550, fol.

G. Budæi, Annotationes in XXIV. Pandectarum libros. Paris, 1508, fol., and many later editions; the last, Lyons, 1567, 8vo.

Andr. Alciati, Commentarii in varios titulos Digestorum; in his works. Lyons, 1560, Vols. 1 and 2.

E. Baronis, Commentarii ad rā spūta Digestorum. Paris, 1548, fol., in his works, Vol. 1, and to titles of the Digest in the 2d Vol. p. 49.

F. Duareni, Commentarii in varios Digestorum libros et titulos; in his works, published at Frankfort, 1598, fol., p. 1-1026.

J. Cujacii, Commentarii in quosdam Pandect. titulos, in his works, edited by Ranius, Vol. 1, p. 893. Notæ in Digesta, in his works, Vol. 10, p. 382. Recitationes solennes in Digesta, in his works, Vols. 7, 8. Recitationes solennes ad nonnullos titulos Digestorum, in his works, Vol. 10, p. 1046.

Hug. Donelli, Comment. in quosdam titulos Digestorum. Antwerp, 1582, fol., in his works, Vols. 10 and 11.

Fr. Hotomani, Scholæ in LXX. tit. Dig. et Cod., in his works, Vol. 2, p. 1.

H. Giphani, Lecturæ Altorphinæ in varios titulos Dig. et Cod. Frankfort, 1605, 4to.

Ant. Fabri, Rationalia in Pandectas (ad lib. 1-19). Vol. 1, Geneva, 1604; Ibid. 1619. Vols. 2-5, Ibid. 1619-1626, fol. Vols. 1-5, Lyons, 1659-1663, fol.

And his Conjecturæ Juris Civilis. Lyons, 1591-1597, fol.; the last edition, Leyden, 1718, 4to.

J. Brunnemanni, Comment. ad Pandectas. Frankfort-on-the-Oder, 1670, fol. cura Sam Strykii. Wittenberg, 1731, fol.

A. Mornacii, Observationes in L. libros Digestorum. Vols. 1 and 2. Paris, 1654-1660, fol.; in his works, Vols. 1-4; Ibid. 1721, fol.

Jani a Costa, Prælectiones ad Illustriores quosdam titulos locaque selecta Juris Civilis, edited and with notes by *B. Voorda*. Leyden, 1773, 4to.

A. D. Alteserræ, Recitationes quotidianæ in Claudii Tryphonini, libros XXI. Disputationum et varias partes Dig. et Cod. 2 vols., Toulouse, 1679-1684, 4to.

3. *Code.*

Odofredi, Lectura in XII. libros Codicis. Lyons, 1550, fol.

Azonis, Lectura s. Comment. ad sing. leg. XII. libr. Cod. Justiniani. Paris, 1577, fol.

Andr. Alciati, Adnotat. in tres posteriores libros Codicis; Commentar. in varios tit. Codicis; in his works. Lyons, 1560, Vols. 1, 4, 5.

J. Sichardi, Prælectiones in Codicem. Vols. 1, 2, Basle, 1565, fol.; Frankfort, 1586; Ibid. 1614, fol.

J. Cujacii, Comm. in tres postremos libros Codicis; in his works edited by Ranius, Vol. 2; Recitationes solennes in Codicem; in his works, Vol. 9; Notæ in Cod.; in his works, Vol. 10, p. 603-744; Recitationes solennes in libros IV. priores Cod.; in his works, Vol. 10, p. 813, *seq.*

F. Hotomani, Scholæ in LXX. titulos Dig. et Cod.; in his works, Vol. 2, p. 261.

H. Donelli, Comm. in II. III. IV. VI. et VIII. libr. Cod. Frankfort, 1599, fol.; Ibid. 1620; and in his works, Vols. 7-9.

H. Giphani, Explanatio difficiliorum et celebriorum legum Codicis. Col. Planicianæ, 1614, 4to; Basle, 1615; Frankfort, 1631, 4to.

A. Mornacii, observat. in libr. Cod. I. III. IV. Paris, 1620; and in his works Vols. 1-4.

Peræ, Prælectiones in Codicem. Cologne, 1661, 2 vols. 4to, and often since.

Jo. Brunnemanni, Comment. in XII. libr. Cod. Leipsic, 1679; Ibid. 1699, fol.

P. et F. Pithæi, Comm. ad Cod. Just., edited by F. Desmares. Paris, 1689, fol.

J. J. Wittenbachii, Comm. in libros IV. priores Cod. Frankfort, 1660, 4to in libr. V. VI. et VII.; Ibid. 1664; the latest edition, Ibid. 1701.

C. Regeneri ab Oosterga, Comm. in omnes et singulas leges, quæ continentur in Codice. Utrecht, 1666, 4to.

A. D. Alteserræ, Recitationes quotidianæ in varias partes Dig. et Cod. Vols. 1, 2, Toulouse, 1679–1684, 4to.

4. *Novels.*

F. Balduini, Breves comment. in præc. Just. novellas sive Auth. Constit. Lyons, 1548, 4to.

J. Cujacii, Expositio novell. Const. Just.; in his works, edited by Ranius, Vol. 2, p. 1017, seq.

J. Stephani, Expositiones novellar. Constit. Frankfort, 1608, 4to.

C. Ritterhusii, Jus Justinianæum, h. e. Novellarum Justiniani expositio methodica. Strasburg, 1615, 4to; Ibid. 1629; Ibid. 1669, 4to.

The following works afford great assistance in referring to the illustrations of single passages of Justinian's law collections which are scattered throughout the above mentioned and other exegetical works:

C. F. Hommelii, Corpus Juris Civilis cum not. varior. Leipsic, 1768, 8vo.

A. Schultingii, Notæ ad Dig. cum animadversionibus. *Nic. Smalenburgii*, Leyden, 1804–1835, 7 vols. 8vo. (The seven volumes refer to the seven partes Digestorum (§ 74, *supra*), and the seventh volume is in two parts.)

For the exegetical writers, see, in general, *E. Spangenberg*, Einleitung, p. 284–400.

V. HISTORICAL AND ANTIQUARIAN WORKS.

A. ON THE CONSTITUTION AND GOVERNMENT OF THE ROMAN STATES.

Pauli Manutii, Antiquitates Romanæ. The single treatises, de Legibus, de Senatu, de comitiis Romanorum and de Civitate Romana, are contained in *J. G. Grævii*, Thesaurus antiquitatum Romanarum, Vols. 1 and 2.

Onuphrii Panvinii, Reipublicæ Romanæ commentariorum libri III. Venice, 1558, 8vo; and afterwards enlarged. Paris, 1588. The single treatises are to be found in *Grævii*, Thesaurus, Vols. 1, 3.

Francisci Hotomani, Antiquitatum Romanarum libri V.; in his works, Vol. 3, p. 191–764; and partly in *Grævii*, Thesaurus, Vol. 2.

C. Sigonni, de antiquo Jure populi Romani libri XI. The best edition of this valuable work is contained in his works. Milan (1732–1737, 6 vols. fol.), 1736, Vol. 5.

Emman. Duni, Origine et progressi del cittadino e del governo civile di Roma, 1763, 1764, 8vo. Translated into German by *W. Eisendecker*. Hamburg, 1829, 8vo.

L. De Beaufort, La République Romaine, ou plan général de l'ancien gouvernement de Rome, in 2 vols. 4to. Hague, 1766; Paris, 1767, in 6 vols. 12mo; Hague, 1775, 8vo.

Berth. G. Niebuhr's Roman History.

C. F. Schultæ, Von den Volksversammlungen der Römer. (On the Assemblies of the Roman People or Comitia.) Gotha, 1815, 8vo.

T. M. Zecharia, Versuch einer Geschichte des Römischen Rechts. (Essay on the

History of Roman Law.) Leipsic, 1814, 8vo. See on this topic the 1st and 2d divisions of that work.

C. D. Hüllmann, Staatsrecht des Alterthums. (Public Law of Equity.) Cologne, 1820, 8vo; and especially the Römische Grundverfassung (Roman Constitution). Bonn, 1832, 8vo.

C. A. Gründler, Handbuch der Römischen Rechtsgeschichte. Bamberg, 1821, 8vo.

Hopfensack, Staatsrecht der Unterthanen der Römer. (Public Law of the Subjects of Rome.) Düsseldorf, 1829, 8vo.

Schultz, Grundlegung zu einer geschichtlichen Staatswissenschaft der Römer. (Foundation for a History of the Political Science of the Romans.) Cologne, 1833, 8vo.

K. S. Zacharü, Lucius Cornelius Sulla, genannt der Glückliche, als Ordner des Römischen Freistaats. 2 parts, Heidelberg, 1834, 8vo.

K. D. Hüllmann, Ursprung der Röm. Verfassung. Bonn, 1835, 8vo.

P. E. Huschke, die Verfassung des Königs Servius Tullius als Grundlage zu einer Röm. Verfassungsgeschichte. Heidelberg, 1838, 8vo.

Karl Peter, über die Grundzüge der Entwicklung der Röm. Verfassung. Meiningen, 1839.

J. Rubino, Untersuchungen über Römische Verfassung und Geschichte. Cassel, 1839, 8vo.

Göttling, Geschichte der Römischen Staatsverfassung. Halle, 1840, 8vo.

Karl Peter, Epochen der Verfassungsgeschichte in Roms Republik. Leipsic, 1841, 8vo.

W. Ihne, Forschungen auf dem Gebiete der Röm. Verfassungsgeschichte. Frankfurt, 1847, 8vo.

J. D. Gerlach and *J. J. Bachofen*, Geschichte der Römer. Basle, 1851, 8vo.

A. Schwegler, Röm. Geschichte, 3 vols. Tübingen, 1853–1858, 8vo.

Th. Mommsen, Roman History.

B. HISTORY OF THE ROMAN LAW IN PARTICULAR.

1. External History.

Aymari Rivalii, Historiæ Juris Civilis libri V. Mayence, 1527, 8vo; and frequently since.

Jac. Gothofredi, Manuale Juris. It contains among other things a brief history of law, and has often been republished. The best editions are those of Leyden, 1684, 12mo; Geneva, 1710, 12mo; Paris, 1806, 8vo. It is to be found also in his minor works, edited by Trotz, p. 1237.

G. Schubart, de fatis Jurisprudentiæ Romanæ. Jena, 1696. Afterwards edited by C. G. Tilling, Leipsic, 1797, 8vo.

Ch. G. Hoffmann, Historia Juris Romani. Vol. 1, Leipsic, 1718, 1734; Vol. 2, Leipsic, 1728, 4to.

J. S. Brunquell, Historia Juris Romano-Germanici. Jena, 1727, 8vo; afterwards Amsterdam and Leyden, 1751, 8vo.

Ant. Terrasson, Histoire de la Jurisprudence Romaine. Paris, 1750, fol.

R. F. Telgman, Geschichte des Römischen Rechts. Salzwedel, 1730, 8vo; afterwards, much enlarged and improved, Göttingen, 1736; latest edition by Scheidemann, Leipsic, 1780, 8vo.

J. G. Heineccii, Historia Juris Civilis Romani et Germanici. Halle, 1733, 8vo; Leyden, 1740; with notes by Ritter, Ibid. 1748; and with these edited by Silberrad, Strasburg, 1751 and 1765, 8vo.

J. A. Bach, *Historia Jurisprudentiæ Romanæ*. Leipsic, 1754, 8vo; with annotations by *A. C. Stockmann*, 6th ed. Leipsic, 1806.

C. G. Haubold, *Historia Juris Romani tabulis synopticis secundum Bachium concinnatis illustrata*. Leipsic, 1790, 4to. A new edition of this work by Jourdan, with some alterations and additions, appeared in Paris, 1823.

Th. M. Zachariæ, *Versuch einer Geschichte des Römischen Rechts*. Leipsic, 1814, 8vo. See on this topic the third division of that work.

C. C. Dabelow, *Römische Staats und Rechtsgeschichte im Grundrisse*. (Outlines of the History of the Roman State and Laws.) Halle, 1818, 8vo.

Berriat Saint-Prix, *Histoire du droit Romain*. Paris, 1821, 8vo.

Maciejowski, *Historia Juris Romani*. Warsaw, 1825, 8vo, 2d ed.

Tigerström, *die äuszere Geschichte des Römischen Rechts*. Berlin, 1841, 8vo.

A. Brzleben, *Lehrbuch des Röm. Rechts*, 1 vol., *Einleitung in das Röm. Privatrecht*. Göttingen, 1854. The first five chapters of the second book, § 17–40, relate to this topic.

2. Internal Legal History and Antiquities.

Heineccii, *Antiquitatum Romanarum jurisprudentiam illustrantium syntagma, secundum ordinem Institutionum digestum*. Halle, 1719, 8vo. Many editions have appeared since. Among them are those by Cannegieter, Louvain, 1777, 8vo; by C. G. Haubold, Frankfort, 1822; and by C. F. Mühlenbruch, Frankfort, 1841.

Selchow, *Elementa Antiquitatum Juris Romani publici et privati*. Göttingen, 1757, 8vo. Enlarged under the title *Elementa juris Romani ante-Justiniani*. Göttingen, 1778, 8vo.

Tigerström, *die innere Geschichte des Römischen Rechts*. Berlin, 1838, 8vo.

The following works may be used as auxiliary to the study of the antiquities of the Roman law:

Sam. Pitisci, *Lexicon Antiquitatum Romanarum*, 3 vols. Hague, 1737, fol.

G. H. Nieupoort, *Rituum qui olim apud Romanos obtinuerunt succincta explicatio*. Utrecht, 1712, 8vo. Many later editions have been published; the latest, Leyden, 1802. A French translation of this work, with the title *Explication abrégée des coutumes et cérémonies observées chez les Romains*, par *Desfontaines*, appeared Paris, 1750. See also *C. G. Schwarz*, *Observationes ad Nieupoortii Compendium antiquitatum Romanarum cum præf. A. M. Nagel*. Altorf, 1757, 8vo. *C. J. G. Haymann*, *Anmerkungen über Nieupoort's Handbuch der Röm. Alterthümer*. (Observations on Nieupoort's Work.) Dresden, 1786, 8vo.

G. C. Maternus von Cilano, *Römische Altherthümer*. Edited by Adler, 4 vols. Altona, 1775, 1776, 8vo.

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Ed. Gibbon, *History of the Decline and Fall of the Roman Empire*, chap. 44.

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VI. DOGMATICAL WORKS.

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Delvincourt, *Juris Romani elementa secundum ordinem Institutionum*. Paris, 1814. 4th ed. *Ibid.* 1823, 8vo.

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b. *Arranged Systematically.*

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T. Schmalz, *Handbuch des Römischen Privatrechts*. Königsberg, 1793, 8vo.

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J. Christiansen, Institutionen des Röm. Rechts. Altona, 1843, 8vo.

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G. Hufeland, *Lehrbuch des in den deutschen Ländern geltenden gemeinen Civilrechts*. (Compendium of the German Common Civil Law.) Giessen, Vol. 1, 1808, and Vol. 2, 1814.

Bucher, *System der Pandekten*. Marburg, 1808; 2d ed., enlarged and improved, Halle, 1811; 3d ed., Erlangen, 1822, 8vo.

C. Von Weyhe, *Wissenschaftliche Bearbeitung des allgemeinen deutschen Privatrechts*. (Scientific Treatise on the German Common Law.) Göttingen, 1815. It contains merely the general doctrines of the law.

Joh. Kauffmann, *Anfangsgründe des Röm. Privatrechts*. 4 vols., Vienna and Trieste, 1814–1816, 8vo.

Schweppe, *Das Römische Privatrecht in seiner heutigen Anwendung*. (Roman Law in its present Application.) It first appeared at Göttingen, 1804, Kiel, 1806, 1812; afterwards at Altona, 1814, 1819 and 1822; again at Göttingen, 1828, in 2 vols. It was continued after the author's death by *Meyer*. Vol. 3, *Ibid.* 1831; Vol. 4, 1832; Vol. 5, 1833.

Wening-Ingenheim, *Lehrbuch des gemeinen Civilrechts*. 3 vols., Munich, 1822; 2d ed. 1825; 3d, 2 vols., 1827, 1828; 4th, 1832, in 3 vols. 8vo; 5th ed. by Fritz, 1836, 1838. See on this work *Fritz*, *Erläuterungen, Zusätze und Berichtigungen zu Wening-Ingenheim's Lehrbuch*. 3 nos., Freiburg and Carlsruhe, 1839, 8vo.

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Bumsted, Grundsätze des Pandektenrechts. Vol. 1, Vienna, 1859, 8vo.

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B. MANUALS AND COMMENTARIES.

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Huber, Protectiones Juris Civilis secundum Institutiones. Frankfort, 1678, 1686,

1699. Edited by Thomasius, Leipsic, 1708, with notes by Mencken, Leipsic, 1725; 4to. Many editions since.

Heineccii, Recitationes in elementa Juris Civilis secundum ordinem Institutionum. Breslau, 1765, 1778. Many editions have been published since; the last by Rycker, Ghent, 1818, 8vo.

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Du Caurroy de la Croix, Institutes de Justinien nouvellement expliquées, 3 vols. Paris, 1822–1825; 5th ed., Paris, 1835.

P. H. F. Hänsel, Handbuch der Institutionen, Vol. 1. Leipsic, 1842.

2. On the Pandects.

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M. Wesenbeck, Paratitla in Pandectas. Basle, 1565, fol. Subsequently with the title Commentarius in Pandectas, edited by Brederodii, Ibid. 1589, fol., and Erfurt, 1616, and especially with notes by Echti and Vinii, Leyden, 1649; and often afterwards with notes by others.

J. Meieri, Collegium Argentoratense. Strasburg, 1616, 1617, 4to, with annotations by J. O. Tabor. Edited by Peghtold in 3 vols. Strasburg, 1657, 4to.

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Struvii, Syntagma Juris Civilis, with additions by Müller, 3 vols. Frankfort and Leipsic, 1692. Many editions since; the latest, 1730, 4to.

Lauterbach, Collegium theoretico-practicum ad Pandectas, 3 vols. Tübingen, 1690–1711. The last of the many later editions, 1784, 4to.

Voet, Commentarius ad Pandectas. Vol. 1, Leyden, 1698, fol.; Vol. 2, Hague, 1704, fol., and often since. Latest edition, Halle, 1776–1780, 6 vols. 8vo.

Noodt, Commentarius in Pandectarum, lib. I.–IV. Leyden, 1716, 4to; in lib. I.–XXVII., in his works, Vol. 2, Leyden, 1724, fol., and subsequently.

Glück, Ausführliche Erläuterung der Pandekten nach Hellfeld, 34 vols. Embracing the first 29 books of the Pandects. Erlangen, 1790–1830, 8vo. Tables of contents to the 34 volumes, Ibid. 1822, 1823, 1832 (3 vols.). After Glück's death it was continued by the late *C. F. Mühlenbruch*, Vols. 35–43, 9 vols., 1832–1841. It has been further continued by Ed. Fein. See also *Reinhardt*, Ergänzungen zu Glück's Erläuterung der Pandekten, 4 vols., Stuttgart, since 1833. This work of Glück's is the most comprehensive and complete that has appeared on the Roman law.

b. Arranged Systematically.

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Hugo Donellus, Commentariorum Juris Civilis libri XXVIII., 6 vols., edited by Gentilis. Frankfort, 1595–1597, fol. Latest edition by *König* and *Bucher*, 16 vols., Nuremberg, 1801–1834. A splendid edition of Donellus' Commentaries has been published in London, in 12 vols. imp. fol.

Domat, Le Lois Civiles dans leur ordre naturel. Paris, 1689–1697, 3 vols. The latest edition is by J. Remy, Paris, 1828–1830, 4 vols. 8vo.

Hofacker, Principia Juris Civilis Romano-Germanici, 3 vols. Tübingen, 1798–

1798, 8vo; 2d ed., Ibid. 1800–1803. An index rerum et verborum to the work was published by Faulhaber, Ibid. 1801.

P. L. Fritz, das Pandektenrecht, 2 vols. Meissen, 1835–1837, 8vo.

J. F. L. Göschel, Vorlesungen über das gemeine Civilrecht. Collected from his literary remains and edited by Albr. Erxleben, 3 vols. Göttingen, 1838–1840, 8vo.

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Sintenis, das praktische gemeine Civilrecht. Leipsic, 1844–1851, 3 vols.; 2d ed., Ibid. 1860, 1861, 3 vols. 8vo.

Holtschaker, Theorie und Kasuistik des gemeinen Civilrechts. Leipsic, 1843–1847; 2d ed., Ibid. 1857, 1858, 2 vols. 8vo.

A. E. I. Schmid, Handbuch des gegenwärtig geltenden gemeinen deutschen Rechts. Special part, 2 vols. Leipsic, 1847, 1848. (It is to embrace the German Institutes, and is not yet completed.)

P. L. von Keller, Pandekten; Lectures from his literary remains, edited by Emil Friedberg, Leipsic, 1861.

Wächter, Handbuch des im Königreiche Württemberg geltenden Privatrechts. Stuttgart, 1845. Till the present but 2 vols. have been published. In addition to which is his *Erörterungen, aus dem Röm. deutschen und Württemberg Privatrecht*. Parts 1–3. Stuttgart, 1845, 1846, 8vo.

J. Unger, System des österreichischen allgem. Privatrechts. At present but 2 vols. Leipsic, 1856–1859.

C. MONOGRAPHS.

The works on single parts and doctrines of the Roman law will be mentioned under the subdivisions to which they belong.

D. CONTROVERSIES.

A. Merendæ, *Controversiarum Juris Civilis libri XXIV*. Ticino, 1624–1647, in 4 vols. fol.; Venice, 1710; Brussels, 1745.

Sam. De Cocceii, *Jus Civile controversum*. Frankfurt-on-the-Oder, 1729, 4to. The last edition, with a preface by C. F. Walch, and notes by J. E. B. Emminghaus, Leipsic, 1791–1798, 2 vols. 4to.

C. F. Walch, *Introductio in controversias Juris Civilis*. Jena, 1771, 1776, 1791; 4th ed., edited by C. E. Schmid, Vol. 1, Nos. 1 and 2, Ibid. 1810, 4to.

E. ON THE PRESENT USE AND APPLICATION OF THE CIVIL LAW.

J. Schüller, *Exercitationes ad quinquaginta libros Digestorum*. Jena, 1675–1680, 4to. Afterwards under the title *Praxis Juris Romani in foro Germanico*. Jena, 1696; Leipsic, 1713; Frankfurt, 1733, fol.

Berger, *Œconomia Juris ad usum hodiernum accommodati*. Leipsic, 1712, 4to; and often since. The 6th edition by J. A. Bach, Ibid. 1755; the 7th by Winckler, Ibid. 1771; the 8th by Haubold, Vol. 1, Ibid. 1801. (Only the first volume of this edition has appeared.)

Sam. Stryk, *Usus modernus Pandectarum*. Vols. 1–4, 5th ed., Halle, 1717, 4to.

J. H. Böhrer, *Exercitationes ad Pandectas*. Edited by G. L. Böhrer, Vols. 1–6. Hanover and Göttingen, 1745–1764, 4to.

Des. Mevii, *Decisiones Wisuariensis tribunalis*. Stralsund, 1654, 1675; and often since. The last edition is by Höpfner. Vols. 1 and 2, Frankfurt, 1791–1794, fol.

Leyser, *Meditationes ad Pandectas*. The first 9 vols., Leipsic, since 1717, 4to; 2d ed., Ibid. 1733–1747. The first 6 vols., 3d ed., Ibid. 1741–1744; 10th vol., Ibid. 1747; 11th vol., edited by *Jenichen*, Ibid. 1748; and again, 1772, *et seq.*; 12th and 13th vols., edited by Höpfner, Giessen, 1774–1780, 4to.

Meller, *Observationes practicæ ad Leyseri meditationum opus*. 6 vols., Leipsic, 1786–1793, 8vo.

Wernher, *Selectæ Observationes forenses*. 9 vols., Wittenberg, 1710–1722, 4to; 3 vols., Jena and Leipsic, 1756, fol.

Pufendorf, *Observationes juris universi*. 4 vols., Celle and Hanover, 1744–1770, 4to; *Ibid.* 1780–1784. And his *Animadversiones juris*. Vol. 1, Hanover, 1783, 4to.

Hommel, *Rhapsodia quæstionum in foro obvenientium*. Leipsic, 1765, 1766, 4to. Latest edition by Roessig. Bayreuth, 1782–1787, 4to, 7 vols.

Struben, *Rechtliche Bedenken*. (Legal Opinions.) 5 vols., Hanover, 1760; 2d ed. 1772–1786. Systematically arranged, enlarged and furnished with notes by *E. Spangenberg*. 3 vols., Hanover, 1827, 1828, 4to.

Kind, *Quæstiones forenses*. 4 vols., Leipsic, 1792–1802; 2d ed., enlarged and improved, 1807, 8vo.

Geiger and *Glück*, *Merkwürdige Rechtsfälle*. (Remarkable Legal Cases.) 3 vols., Erlangen, 1792, 1794, 1806, 8vo.

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B. W. Pfeiffer, *Praktische Ausführungen aus allen Theilen der Rechtswissenschaft*. (Practical Views on all Branches of the Law.) 8 vols., Hanover, 1825–1846, 4to.

C. A. Gottschalk, *Selecta Disceptationum forensium capita*. There are appended to it, Decisions of the Supreme Court of Appeal of Saxony. 3 vols., Dresden, 1816–1823, 8vo; 2d ed., *Ibid.* 1826–1830.

Langenn and *Kori*, *Erörterungen aus dem gemeinen und sächsischen Rechte*. (Discussions on the Civil and Saxon Law.) Vols. 1, 2, Dresden and Leipsic, 1829, 1831, 8vo; Vol. 3, by Kori alone, 1833; 2d ed. 1836, 1837.

A. Heise and *F. Cropp*, *Juristische Abhandlungen*. (Juridical Treatises.) Vol. 1, Hamburg, 1827; Vol. 2, *Ibid.* 1830, 8vo.

F. COLLECTIONS OF TREATISES ON SINGLE SUBJECTS OF THE ROMAN AND GERMAN PRIVATE LAW.

1. *By the Same Author.*

Ant. Fabri, *de Erroribus pragmaticorum et interpretum Juris*. Latest edition, Lyons, 1658, 2 vols. fol.

Arn. Vinnii, *Selecta Quæstiones Juris Civilis*. Leyden, 1653, 8vo. Several editions since; the last, Utrecht, 1722, 4to.

Huber, *Digressiones Justinianæ*. The 3d edition, Frankfort, 1696, 4to.

W. A. Lauterbach, *Dissertationes academicæ*. Vols. 1–4, Tübingen, 1728, 4to.

J. N. Hert, *Opuscula*. Edited by J. J. Hombergk. 2 vols., Frankfort, 1737, 4to.

H. De Cocceii, *Exercitationes curiosæ*. 2 vols., Lemgo, 1722, 4to.

J. P. Ludewig, *Opuscula miscellanea*. 2 vols., Halle, 1720, fol.

G. Majansii, *Disputationes Juris*. 2 vols., Leyden, 1752, 4to.

A. Schulting, *Commentationes academicæ*. Edited by Uhle. 4 vols., Halle, 1770–1774, 8vo.

F. C. Conradi, *Scripta minora*. With a preface and annotations by Pernice. Vol. 1, Halle, 1823, 8vo.

J. L. Conradi, *Varia ex Jure Civili*. Marburg, 1764, 8vo. And his *Opuscula e Jure Civili*. 2 vols., Bremen, 1777, 1778.

J. G. Bauer, *Opuscula academica*. 2 vols., Leipsic, 1787, 8vo.

Meister, *Opuscula selecta*. Göttingen, 1766, 1775, 8vo.

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Püttmann, *Adversaria juris universi*. 3 vols., Leipsic, 1775–1788, 8vo.

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Quistorp, *Beiträge zur Erläuterung verschiedener Rechtsmaterien*. (Illustrations of Different Branches of Law.) Rostock, 1787, 8vo. And his *Rechtliche Bemerkungen*. (Legal Observations.) Leipsic, 1793, 4to.

A. D. Weber, *Versuche über das Civilrecht und dessen Anwendung*. (Essays on the Civil Law and its Practical Application.) Schwerin and Wismar, 1801, 8vo.

Thibaut, *Versuche über einzelne Theile der Theorie des Rechts*. (Essays on Different Parts of the Theory of Law.) Jena, 1798–1801, 2 parts, 8vo; 2d ed., 1817. And his *Civilistische Abhandlungen*. (Civil Law Treatises.) Heidelberg, 1814, 8vo.

Fenerbach, *Civilistische Versuche*. (Essays on the Civil Law.) Giessen, 1803, 8vo.

Pfeiffer, *Vermischte Aufsätze über Gegenstände des deutschen und römischen Privatrechts*. (Miscellaneous Treatises on the German and Roman Private Laws.) Marburg, 1803, 8vo.

Schöman, *Handbuch des Civilrechts in einzelnen Abhandlungen*. (Manual of the Civil Law, consisting of single treatises.) 2 vols., Giessen, 1806, 8vo.

E. Schrader, *Abhandlungen aus dem Civilrechte*. (Treatises on the Civil Law.) Hanover, 1808. And his *Civilistische Abhandlungen*. (Civil Law Treatises.) Weimar, 1816, 8vo.

G. Hufeland, *Ueber den eigenthümlichen Geist des Römischen Rechts*. (On the Spirit of the Roman Law; a series of treatises.) 2 vols., Giessen, 1815–1817, 8vo. And his *Beiträge zur Berichtigung und Erweiterung der positiven Rechtswissenschaft*. (Contributions to the Improvement and Enlargement of the Science of Positive Law.) 6 nos., Jena, 1802.

C. C. Dabelow, *Handbuch des Pandektenrechts, in einer Kritischen Revision seiner Hauptlehren*. (Manual of the Law of the Pandects; a Critical Examination of its Principal Doctrines.) Halle, 1816–1818, 3 vols. 8vo.

Unterholzner, *Juristische Abhandlungen*. (Treatises on Law.) Munich, 1810, 8vo.

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E. Kämmerer, *Beiträge zur Geschichte und Theorie des Röm. Rechts*. (Contributions to the History and Theory of the Roman Law.) 1 vol., Rostock and Schwerin, 1817, 8vo.

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C. F. Reinhardt, *Vermischte Aufsätze aus dem Gebiete der reinen und angewandten Rechtswissenschaft*. (Miscellaneous Treatises on Matter of Abstract and Practical Law.) 3 nos., Stuttgart, 1822–1827, 8vo.

J. A. Stueffert, *Erörterungen einzelner Lehren des Röm. Privatrechts*. (Discussions of different Doctrines of Roman Private Law.) 2 vols., Würzburg, 1820, 1821, 8vo.

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1820; 2 vols. 8vo. And his *Beiträge zur Kunde des Röm. Rechts.* (Contributions to the Knowledge of the Roman Law.) Leipsic, 1825.

L. J. Neustetel and *S. Zimmern*, *Römisch-rechtliche Untersuchungen.* (Inquiries into the Roman Law.) Vol. 1, Heidelberg, 1821, 8vo.

G. F. Puchta, *Civilistische Abhandlungen.* Leipsic and Berlin, 1823, 8vo.

P. L. Kritz, *Abhandlungen über ausgewählte Materien des Civilrechts.* (Treatises on select Matter of the Civil Law.) Leipsic, 1824.

C. J. Meno Valett, *Abhandlungen aus dem Gebiete des Römischen Privatrechts.* (Treatises on Matter in the Department of Roman Private Law.) 1 vol., Göttingen, 1824, 8vo.

Haubold, *Opuscula academica.* Vol. 1, edited by *Wenck*, Leipsic, 1825; Vol. 2, by *Stieber*, Ibid. 1829, 8vo.

C. G. Biener, *Opuscula academica.* Edited with a preface by *F. A. Biener*, in 2 vols. Leipsic, 1830, 4to.

W. Francke, *Civilistische Abhandlungen.* Göttingen, 1826, 8vo. And his *Beiträge zur Erläuterung einzelner Rechtsmaterien.* (Illustrations of different Matter of Law.) Ibid. 1828.

C. A. Weiske, *Sceptisch-praktische Behandlung einiger Gegenstände des Civilrechts.* (Practical Treatises on several Matters of the Civil Law, with Critical Remarks.) Leipsic, 1829, 8vo.

C. J. Guyet, *Abhandlungen aus dem Gebiete des Civilrechts.* (Treatises on Matters of the Civil Law.) Heidelberg, 1829.

P. E. Huschke, *Studien des Röm. Rechts.* 1 vol., Breslau, 1830, 8vo.

H. R. Brinkmann, *Wissenschaftlich-praktische Rechtskunde.* (On Practical Legal Science.) Sleswick, 1831, 8vo.

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C. F. C. Wenck, *Opuscula academica*, edited by *Stieber*. Leipsic, 1834.

Arndts, *Beiträge zu verschiedenen lehren des Civilrechts und Civilprocesses.* Bonn, 1837.

C. O. von Madai, *Beiträge zur Dogmengeschichte des gemeinen Civilrechts.* Riga and Leipsic, 1839.

A. Schmidt (von Ilmenau), *civilistische Abhandlungen.* Vol. 1, Jena, 1841.

Dirksen, *vermischte Schriften.* Vol. 1, Berlin, 1841.

Eud. Thering, *Abhandlungen aus dem Römischen Recht.* Leipsic, 1844.

J. J. Bachofen, *ausgewählte Lehren des Röm. Civilrechts.* Bonn, 1848.

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C. Heyer, *Abhandlungen aus verschiedenen Theilen der Rechtswissenschaft.* (Treatises on different Parts of Legal Jurisprudence.) Giessen, 1841.

2. By Different Authors.

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B. Ottonk, *Thesaurus Juris Romani*. Leyden and Utrecht, 1725, in 4 vols. fol. Utrecht, 1733-1735, in 5 vols. fol.; Basle, 1744, in 5 vols. fol.

G. Neermann, *Novus Thesaurus Juris Civilis et Canonici*. Hague, 1751-1753, in 7 vols. fol.; with a supplement after the author's death by J. L. B. Mee Hague, 1780, fol.

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Besides the legal periodicals which have already been mentioned the following deserve to be noticed:

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Archiv für Civilistische Praxis. Edited by *Gensler*, *Mittermaier*, *Schweitzer*, and others. 44 vols., Heidelberg, since 1818.

Zeitschrift für Civilrecht und Process. Edited by *Linde*, *Marezoll* and *Wening-Ingenheim*, and, after the death of the last, by *Schröter*. 20 vols. Published at Giessen since 1828.

Themis, *Zeitschrift für praktische Rechtswissenschaft*. Edited by *Elvers*. 2 vols., Göttingen, 1827-1829. *Neue Themis*. Nos. 1 and 2, 1838-1841.

Thémis, ou *Bibliothèque du Jurisconsulte*, par une réunion de magistrats, de professeurs et d'avocats. Vol. 1-7, Paris, 1819-1825; Vol. 8-10, Brussels, 1825-1831, 8vo.

Bydragen tot Regtgeleerdheid en Wetgeving. By *C. A. Den Tex* and *J. Van Hall*. Vol. 1-6, Amsterdam, 1826-1832, 8vo. Continued with the title *Jaarboeken voor Regtgeleerdheid*, etc. Part 1-12. And since 1851 under the title *Nieuwe Bydragen*, etc.

F. C. K. Schunck's *Jahrbücher der gesammten deutschen juristischen Literatur*. (Annals of the whole German Legal Literature.) 27 vols., Erlangen, 1824-1836.

Kritische Zeitschrift für Rechtswissenschaft. Edited by *R. Mohl*, *C. Scheurlen*, *E. Schrader*, *C. G. Wächter* and *K. Wächter*. 6 vols., Tübingen, 1826-1830, 8vo.

Richter and *Schneider*, *Kritische Jahrbücher*. Leipsic, since 1839, 24 vols.; still continued.

Rechert, *Zeitschrift für Civil und Criminalrecht*. Heidelberg. Begun in 1821; present 6 vols.

K. Sell and *W. Sell*, *Jahrbücher für historische und dogmatische Bearbeitung des römischen Rechts*. (Annals of the History and Theory of the Roman Law.) 3 vols., Brunswick, 1841-1844.

Magazin für Rechts und Staatswissenschaft mit besonderer Rücksicht auf das kaiserliche Österreich. Edited by *Haimeri*, Vienna, 1849-1857, 16 vols. (Magazine for Private and Public Jurisprudence, especially relating to the Austrian Empire.) And the *Oesterreiche Vierteljahrschrift*. (The Austrian Quarterly.) Vienna, 1858: at present 10 vols. (The Austrian Quarterly.)

the Entire Jurisprudence.) Edited by Brinkmann, Dernburg, and others. Heidelberg, 1853-1859, 5 vols.

Kritische Ueberschau der deutschen Gesetzgebung und Rechtswissenschaft. (Critical Review of German Legislation and Jurisprudence.) Edited by Arndts, Bluntschli and Pözl. Munich, 1853-1859, 6 vols.

Jahrbücher der deutschen Rechtswissenschaft und Gesetzgebung. (Yearbooks of German Jurisprudence and Legislation.) Edited by Schletter, Leipsic, 1854; at present 7 vols.

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Jahrbuch der deutschen Rechtswissenschaft und Gesetzgebung. Edited by Bekker and Muther, Leipsic, 1857; at present 5 vols.

Kritische Vierteljahrschrift für Gesetzgebung und Rechtswissenschaft. Edited by Pözl, Munich, 1859; at present 3 vols.

GENERAL PART.

FIRST DIVISION.

GENERAL LEGAL VIEWS OF THE ROMANS.

I. LAW AND JUSTICE (*Jus et Justitia*).

§ 123. Law among the Romans was primarily founded on morality.¹ They did not distinguish so strictly between law and morals as our present law philosophers do.² "*Jus est ars boni et æqui*" (law is the science of what is right and reasonable), said they; and Ulpian, wholly in this spirit, demands of jurists as priests of justice that they should make men not only just externally, but also good internally.³ Jurisprudence was to them the knowledge of divine and human things, the science of right and wrong ("*divinarum atque humanarum rerum notitia justi atque injusti scientia*");⁴ and justice was not simply the external legality of acts, but the accord of external acts with the precepts of the law prompted by internal impulse and free volition.⁵

II. PUBLIC AND PRIVATE LAW (*Jus publicum et privatum*).

§ 124. In regard to its object, the Romans divided jurisprudence into the science of public law (*Jus publicum est, quod ad statum rei Romanæ spectat*) and the science of private law (*Jus privatum est, quod ad singulorum utilitatem spectat*).⁶

¹ Cicero de off. Lib. 1. c. 28; Hugo, Naturrecht, 4th ed., § 15.

² The Romans knew the distinction between external compulsory and non-compulsory duties: Cicero de off. Lib. 1. c. 3; Seneca de ira. Lib. 1. c. 27; fr. 144. pr. D. 50. 17, "*non omne quod licet, honestum est*;" fr. 197. ib.; fr. 42. pr. D. 23. 2; fr. 1. § 5. D. 50. 13. But their distinction between morals and the law of nature was not so strict as that of modern jurists, and they never maintained that the chief characteristic of law is compulsion. Hence they introduced into the doctrines of law three primary principles, "*Juris præcepta sunt hæc: honeste vivere, neminem lædere, eum cuique tribuere*:" § 3. l. 1. 1; fr. 10. § 1. D. 1. 1. See Donellus, comm. jur. Lib. 2. c. 1.

³ fr. 1. pr. § 1. D. 1. 1.

⁴ § 1. l. 1. 1; fr. 10. § 2. D. 1. 1; fr. 2. D. 1. 3; Const. 1. § 1. C. 1. 17.

⁵ pr. l. 1. 1; fr. 10. pr. D. 1. 1. "*Justitia est constans et perpetua voluntas jus eum cuique tribuendi*:" Novel 69, præf.; Cicero de finib. Lib. 5. c. 23; Cicero de invent. Lib. 2. cap. 54; Gellius, Noct. Atticæ. Lib. 17. c. 5.

⁶ § 4. l. 1. 1; fr. 1. § 2. D. 1. 1. See § 8, *supra*.

III. NATURAL LAW, LAW OF NATIONS AND CIVIL LAW (*Jus naturale, gentium et civile*).¹

§ 125. The private law has two different elements, namely, those principles and maxims that are valid in all civilized nations, and those that are peculiar to a certain state; *e. g.*, Rome. The former is termed *jus gentium*; the latter *jus civile*.² This distinction has a practical bearing, which will hereafter be pointed out. Those elements of the Roman law which might be termed *jus gentium*, as a *jus, quo omnes gentes utuntur* (a law which all nations used), were also applicable to the administration of the law for peregrines in the Roman state, while the Roman *jus civile* was only for Roman citizens. The reaction caused by the administration of the law for peregrines in the Roman state, especially by means of the prætorian edict, first effected a considerable increase in the aggregate of the Roman law decisions, which were termed *jus gentium*.³ This law subsequently increased much more, in consequence of the efforts to adapt the Roman law also for Roman citizens in various countries other than Italy.⁴ The *jus gentium* was also frequently termed *jus naturale*,⁵ because it was seen that nearly all its principles accorded with natural reason (*naturalis ratio*).⁶ Notwithstanding which the notion was entertained to designate the slavery existing by the *jus gentium*⁷ as a principle of the natural law.⁸ This probably was the cause that several later classical jurists, among whom was especially Ulpian,⁹ endeavored to improve the classification by dividing law into three parts instead of two, creating a distinction from the *jus civile* and *jus gentium*, which they termed *jus naturale*; whose source they stated was not the natural reason, but the animal nature, of man.¹⁰ This attempt at a new classification had generally but little influence on distinct doctrines of law,¹¹ as it is recognized by only a few Roman authors.¹² Notwithstanding which there are passages

¹ *Hugo*, *Naturrecht*, §§ 16 and 38; *Welcker*, *letzte Gründe*, pp. 498, 515; *Savigny*, *System*, Vol. 1, p. 109, Supplement 1, p. 413.

² *fr. 9. D. 1. 1.* "All people governed by laws and customs employ a system of law that is partly peculiar to themselves, partly common to all mankind. The law established by any given state for its own guidance is peculiar to itself, and is called civil law, the particular law of that state; but that which natural reason has established among all men is observed by all nations alike, and is called the *Jus gentium*. The Roman people, therefore, use a system of law partly peculiar to themselves, partly common to all nations:" *Gaius I. § 1.*

³ See *supra*, § 35.

⁴ See *supra*, § 59.

⁵ *Gaius*, II. §§ 65, 73; § 11. I. 1. 2; § 11. I. 2. 1; *fr. 11. D. 1. 1*; *fr. 2-4 D. 1. 8.*

⁶ See note 2 and *fr. 1. pr. D. 41. 1.* Sometimes *naturalis ratio* is used instead of *jus naturale s. gentium*; *e. g.*, in *Gaius*, II. §§ 66, 69.

⁷ § 3. I. 1. 3.

⁸ *fr. 32. D. 50. 17.*

⁹ See, also, *Tryphonin* in *fr. 64. D. 12. 6* and *Hermogenian* in *fr. 5. D. 1. 1.*

¹⁰ *fr. 1. § 2-4. D. 1. 1.*

¹¹ *Savigny*, *System*, p. 418.

¹² See notes 9 and 10.

in the division of appropriate titles of Justinian's Institutes¹ and Pandects,² especially from Ulpian, which give it such great prominence that here the usual Roman terminology, according to which *jus naturale* and *jus gentium* have the same meaning, might be easily overlooked.³

IV. THE WRITTEN AND UNWRITTEN LAW (*Jus scriptum et non scriptum*).

§ 126. The *jus civile* as above defined was again divided into the written and unwritten law (*jus scriptum et non scriptum*).⁴ The term *jus scriptum* was used by the Romans only in a grammatical sense.⁵ By it was understood all law which was committed to writing, whether it originated from actual enactment or in any other manner, in contradistinction from the unwritten law of custom.⁶

V. THE SO-TERMED LAW OF PERSONS, THINGS AND ACTIONS (*jus personarum, rerum et actionum*).

§ 127. The basis of the system according to which the Romans since Gaius presented the primary elements of their private law was designated by them in the following words:⁷ "*Omne jus, quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones.*" (The entire law which we employ relates either to persons, or to things, or to actions.) We will recur to this again after we have presented in the following sections of the general part the notion of persons, things and actions.

¹ § ult. I. 1. 1; pr. § 1. 2. I. 1. 2.

² See note 10.

³ See, however, fr. 9. D. 1. 1; § 11. I. 1. 2.

⁴ § 3. I. 1. 2; fr. 6. I. D. 1. 1; Cicero de partit. orat. c. 37 extends this division also to the *jus gentium*, which he regards as a kind of *jus non scriptum*.

⁵ *Thibaut*, Versuche, Vol. 1, No. 7; *Savigny*, System, Vol. 1, p. 106; *Glück*, Comm., Vol. 1, § 82.

⁶ Hence the Romans included the *edicta Prætorium* and the *responsa prudentum* in the *jus scriptum*, § 3-9. I. 1. 2.

⁷ Gaius, I. § 8; § 12. I. 1. 2; fr. 1. D. 1. 5.

SECOND DIVISION.

OF PERSONS.

§ 128. Person, in its original acceptation, denotes a human being who is capable or incapable of rights.¹ But in the sources of law, in general only those human beings are denominated persons who can be the subjects of rights.² On the other hand, the original idea, by abstraction and fiction in jurisprudence, has been greatly extended, as in a legal sense many things besides human beings are regarded as persons when the law clothes them with certain rights. On this double change of the original idea of person now rests the division of persons generally into *physical* and *moral* persons, the latter of which are more appropriately denominated *juridical* or *fictitious* persons.³

DIFFERENT CAPACITIES UNITED IN ONE PERSON (*Homo, qui plures sustinet personas*).⁴

§ 129. The word *persona* frequently also signifies simply the characteristic by virtue of which certain rights appertain to and certain duties are imposed on one;⁵ as it frequently happens that a human being unites in himself several such characteristics,⁶ and consequently the various rights and duties springing therefrom (*ut unus homo plures sustinet personas*). In such case his actions are to be judged according to the capacity in which he acted, and what he does in one capacity cannot be prejudicial to him in another.⁷ On the other hand, the advantages which he enjoys in one capacity cannot be transferred to rights which he has in another.⁸

¹ See fr. 2. 3. D. 1. 5; Gaius I. §§ 49, 50, 120, 121, 132; II. § 96; III. §§ 163, 189; IV. § 80; Ulpian XIX. § 18; pr. I. 1. 8; fr. 86. § 2. D. 30; fr. 215. D. 50. 16; fr. 22. pr. D. 50. 17.

² According to the law of nature every man is capable of rights, and is therefore a person in a technical sense. Positive law may change this. Thus the slave is a man, yet by the Roman law he was incapable of rights, therefore not a person in this sense: § 4. I. 1. 16; Theophilus ad § 2. I. 2. 14. Hence with this signification of *persona* depends that by which this word indicates the capability of rights (*caput*): Novel Theod. Const. 24. § 2; Cassiodori, Var. VI. 8; Theophil., *supra*. The capability of rights should not be confounded with the capability for commerce.

³ In the Roman law the physical person is also termed *persona singularis*, in contradistinction from *collegium*, *corpus*, *curia*: fr. 9. § 1. D. 4. 2. Sometimes, however, a legal person is not termed precisely *persona*, but it is said of him, *personas vice fungitur*, or *personæ vicem sustinet*. See fr. 22. D. 46. 1.

⁴ Hert, de uno homine plures sustinente personas, Vol. 1, p. 27.

⁵ In this respect a distinction is also made between *persona publica* and *privata*: § 5. I. 1. 20.

⁶ fr. 3. 4. D. 1. 7; fr. 5. D. 40. 2.

⁷ E. g., § 4. I. 2. 18; Const. 26. C. 5. 37.

⁸ Hert, § 4; Schilling, Inst., Vol. 2, § 24.

CHAPTER I.

PHYSICAL PERSONS.

I. CAPABILITY FOR RIGHTS IN GENERAL.

§ 130. By the term *physical person* is understood a single human being who is capable of rights. Man's capability for rights consists in his possessing the characteristics necessary to have and acquire rights. This capability for rights may be divided into natural and civil. For the natural capability for rights it is simply requisite that one should be a human being. The Roman law regards as human only that being born of a woman who has a human form, though one or other members of his body may have been imperfectly formed (*portentum, ostentum*). If the human form be wanting, it is a monster, and is incapable of rights.¹ The foetus, if it be for its advantage, is also regarded as a future human being. *Nasciturus pro jam nato habetur, si de ejus commodo agitur*. Hence all those rights which he would have had or acquired if he had been born when they accrued are retained for him till his birth.² But in order to actually acquire these and other rights, it is requisite that he be born as a human being and alive.³

II. CIVIL CAPABILITY FOR RIGHTS AMONG THE ROMANS.⁴

1. DIVISION INTO FREEMEN AND SLAVES, AND SUBDIVISION OF FREEMEN.

§ 131. Among the Romans, however, every man was not capable of rights, and every man capable of rights was not in the same grade; but the civil capacity for rights depended on the existence of certain civil qualifications, which were partly determined by the public and partly by the private law. A man to be regarded as capable of rights, or, in other words, as a person in its technical sense, had to be free. The slave was a chattel and could not be the subject, but only the object, of rights.⁵ Freemen were subdivided into

¹ fr. 14. D. 1. 5; fr. 38. 135. D. 50. 16.

² fr. 7. D. 1. 5: "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quotiens de commodis ipsius partus queritur, quamquam alii, antequam nascatur nequaquam proxi:" fr. 26. D. 1. 5; fr. 231. D. 50. 16. Particular applications of these rules are found in fr. 3. D. 48. 19; fr. 18. D. 1. 5; fr. 30. § 1; fr. 84. D. 29. 2; fr. 1. § 1. D. 1. 9; Const. 1. 2. C. 6. 29; fr. 3. D. 5. 4; *Mauchardt*, über die Rechte des Menschen vor seiner Geburt, Frankfort and Leipsic, 1782.

³ Const. 2. 3. C. 6. 29. The common opinion is that a child to be capable of rights must have vitality and must not have been born previous to the 182d day, for which fr. 12. D. 1. 5, fr. 3. § 12. D. 38. 16, are referred to; but neither of these passages speaks of vitality; the former relates to legitimacy, and the latter to the freedom of children born: *Seuffert*, Erört., Vol. 1, p. 50; *Savigny*, Syst., Vol. 2, p. 285. On vitality, see *Ploucquet*, über die phys. Erfordernisse der Erbfähigkeit der Kinder. (On the Physical Requisites for the Right of Inheritance of Children.) Tübingen, 1779.

⁴ *Gaius*, I. § 9, seq.; *Ulpian*, tit. 1-5; *Inst.* I. 3-8, D. 1. 5.

⁵ *Gaius*, I. § 9; *pr.* I. 1. 3; fr. 3. D. 1. 5.

freeborn (*ingenui*) and freedmen (*liberti*; in relation to their patrons, *libertini*, and in the later times also *liberti* in relation to their status).¹ The subdivision of freemen into *cives Romani* and *peregrini* is equally important. The members of the municipality of Rome² (in later times new Rome or Constantinople) were termed *cives Romani*; and they who were not entitled to these municipal rights, which in the course of time were continually extended,³ were termed *peregrini*. According to the ancient Roman national law a peregrine was not recognized to be the subject of rights if he did not hold some especial relation to the Roman state; and if he had to be recognized because he belonged to a state with which Rome had business relations, or because he was a subject of the Roman state, yet he lacked the political rights of a Roman citizen,⁴ and in general he was excluded from all of the provisions of the private law which were not included in the *jus gentium*, but were in the *jus civile*.⁵

CONTINUATION.

§ 132. Respecting slaves and they who were slaves is remarked :

A. In the modes of origin of slavery are—

1. Several which were by the *jus gentium*, which condition existed at all times in the Roman state.⁶ Slavery always originated,

- a. From being taken prisoners in war.⁷
- b. By delivery by the state to the enemy.⁸
- c. By being born of a female slave.⁹

¹ Gaius, I. § 10–12; § 5. I. 1. 3; fr. 5. D. 1. 5.

² Roman citizenship was acquired in threefold ways:

1. By descent from parents who were citizens. In which it depended whether the parents lived in lawful marriage or not: Cicero, *Top.* c. 4; Livy, 38. c. 36; Gaius, I. §§ 56, 67, 80, 88–92; Ulpian, V. § 8–10; fr. 19. 24. D. 1. 5. (Respecting one or more transitory exceptional laws see Ulpian, V. § 8, and Gaius, I. § 77.)

2. By Roman manumission, respecting which see the next section.

3. By especial grant, which in ancient times was by the *comitia*, subsequently by the senate, and still later by the emperor.

Roman citizenship was lost,

1. To those who in any manner lost their freedom.

2. Without loss of freedom, by the acceptance of another citizenship repugnant to the Roman: Cicero *pro Balbo*, c. 11. *pro Cæc.*, c. 34. And sometimes the loss was in consequence of a penalty imposed, in which under the emperors was included expatriation to an island: § 2. I. 1. 16.

⁶ See § 25, note 3, § 43, *supra*, and § 132, *infra*.

⁴ All Roman citizens did not possess this. Hence the division into *cives optimo jure* and *cives non optimo jure*.

⁵ A middle rank between *cives* and *peregrini* in this respect was formed by the *latini*. See Savigny's *verm. Schriften*, Vol. 1, No. 2; Vangerow, *der Latini Juniani* (note 2, p. 125, *infra*).

⁶ § 4. I. 1. 3.

⁷ § 4. I. 1. 3; Tit. Dig. 49. 15.

⁸ fr. 40. 30. D. 49. 15; Zimmermann, R. G. § 195.

⁹ § 4. I. 1. 3. On the case when the mother acquires or loses her freedom after

2. The other modes of origin, which are all by the *jus civile*, were not always the same.

a. Even at an early period the selling as a slave into a foreign land the non-paying debtor,¹ and he who withdrew from the army or from the census which Servius Tullius introduced,² was abolished.

b. On the other hand, in the republican period the rule was adopted, which subsequently was always retained,³ that he who fraudulently permitted himself to be sold as a slave for the purpose of dividing the purchase money with the vendor forfeited his freedom.⁴

c. Further, since the time of Augustus there was the important rule because of property, that he who was sentenced to death or to labor for life in the mines thereby became a penal slave without a master.⁵

d. But the ordinance of the senatusconsult *Claudiani* that a wife who is *rei juris* if she live with a stranger slave in *contubernium* against the will of his master, after an ineffectual warning, shall be a slave⁶ was abolished by Justinian.⁷

e. Since the time of Claudius in many cases and since Constantine universally the ingratitude of a slave to his patron was a cause of returning him to slavery.⁸

B. A slave could acquire freedom at all times by *postliminium* and by *manumissio*, and during the empire reacquired freedom in many cases as his reward or his master's punishment.⁹ He became free by *postliminium* who became a slave by being taken prisoner, when he returned to his fatherland or to a friendly state without having promised to return to the enemy.¹⁰ *Manumissio* is a declaration of the master's will that his slave shall be free; the conditions and operations of which vary considerably.¹¹

1. According to the most ancient law every slave who was lawfully manumitted by a Roman citizen acquired in addition to freedom Roman citizenship and before the birth of the child see Paul, Sent. Rec. II. 24. § 1-3; pr. L. 1. 4.

¹ Gellius, Noct. Att. 20. I.

² *Zimmern*, § 197.

³ § 4. I. 1. 3; § 1. I. 1. 16.

⁴ Presuming that he was aged at least twenty years, which seems to have been first prescribed by a senatusconsult under Claudius: Tit. Dig. § 40. 13; Cod. 7. 18.

⁵ § 3. I. 1. 12; *Zimmern*, § 197.

⁶ Generally the slave of her lover's master, and if she has a patron then the slave of the latter: Gaius, I. § 91. 160; Ulpian, XI. § 1; Paul, S. R. II. 21. a. See Code Theod. 4. 9.

⁷ Const. un. C. 7. 24; Tit. I. 3. 12 (3. 13); *Zimmern*, § 198.

⁸ § 1. I. 1. 16; *Zimmern*, § 200.

⁹ But before Justinian's time in some of these cases he would become only *latinus Junianus*. For greater particularity see Tit. D. 40. 8; Tit. C. 7. 13; *Zimmern*, § 211.

¹⁰ Gaius, I. § 129; Tit. D. 49. 15; Tit. C. Th. 5. 5; Tit. C. J. 8. 51; *Zimmern*, §§ 196 and 196; *Puchta*, Inst. Vol. 2, p. 497, *seq.*

¹¹ Dig. L. 40. T. 1, *seq.*; *Zimmern*, § 201; *Puchta*, Instit. Vol. 2, § 213, *seq.*

ship. But in connection herewith the manumittor as patron had not only certain rights in relation to the manumitted (*libertus*),¹ but the latter in several matters was inferior to the freeborn (*ingenuus*).² For the validity of manumission there was required in addition to that which is self-evident that the manumittor should have the slave not only in ownership, according to the *lex gentium* (*in bonis*), but should own him according to the quiritarian law,³ and that he should observe the necessary form. He must manumit him either *vindicta*, by causing his name to be entered in the list of citizens in the taking of the census, or *testamento*.⁴ By the latter the slave does not become free till the manumittor's death; therefore he had no patron. He was, as the Romans term it, manumitted by death (*libertus orcinus*).⁵ If there were a condition annexed to the testamentary manumission, which at the moment of the testator's death was unperformed, then the slave in the meanwhile was termed conditionally free (*statu liber*).⁶

2. Under Augustus manumission was limited, chiefly for political reasons.

a. By the *lex Ælia Sentia* a manumission made in fraud of creditors was invalid; and, generally, if the manumittor had not attained his twentieth or the manumitted his thirtieth year of age the manumission was invalid; also certain manumitted shall not acquire Roman citizenship because of their conduct when slaves, but they shall be *deditionum numero*, i. e., shall be equal to those conquered peregrines whom the Roman state subjected to favor or disgrace.⁷

b. The *lex Furia Caninia* fixed the proportion of slaves which could be testamentarily manumitted by one in proportion to the number of slaves which he had, which proportion could not be exceeded.⁸

3. The Prætorian edict in some cases protected slaves who were unlawfully manumitted against the obligation of slave labor, namely, if the invalidity was that the manumittor was not yet aged thirty years or only had the slave according to the *lex gentium* (*in bonis*) or observed not the necessary forms.⁹ Of such slaves it is said *in libertate morantur*.

¹ Tit. D. 37. 14. 15.

² These degradations related chiefly to the public law.

³ Gaius, I. §§ 17, 35; III. § 56. The *potestas* over slaves (§ 133, *infra*) only presumed the *in bonis habere*: Gaius, I. § 54.

⁴ Gaius, I. § 17; Ulpian, I. § 6-9.

⁵ fr. 23. 25. D. 40. 4; Ulpian, I. § 22; II. § 8. The manumission by testament should not be confounded with the *fidei commissum libertatis*, which as it under the emperors acquired legal effect, in the first place only obliged one to make a manumission after the testator's death: Ulpian, II. § 7-12; Tit. D. 40. 5; Tit. C. 7. 4.

⁶ Gaius, II. § 200; Ulpian, II. § 1, *seq.*; Tit. D. 40. 7; *Madai*, *Statuliberi des Röm. Rechts*, Halle, 1834.

⁷ Gaius, I. §§ 12-21, 25-27, 36-41, 47; Ulpian, I. § 11-15; § 3. I. 1. 5; Tit. I. 1. 6; Tit. D. 40. 9. See also note 9, *infra*.

⁸ Gaius, I. § 42-46; Gaius, *Epit.* I. 2; Ulpian, I. § 24; Paul, *S. R.* IV. 14.

⁹ Gaius, I. §§ 17, 35; III. § 56; Ulpian, I. §§ 16, 23.

4. By the *lex Junia Norbana* under Tiberius the manumission was valid in the foregoing three cases; however, the manumitted did not become a Roman citizen, but had only the rights of a *latinus*, in which was included the *commercium*.¹ At his death he was again to be regarded as a slave, which was important in relation to property acquired by him.² Gradually a series of special cases arose in which a manumitted of this character, a *latinus Junianus*, acquired the *jus Quiritium*, i. e., *libertus civis Romanus*.³

5. One form of manumission ceased by the abolition of the census;⁴ in place of which Constantine introduced the manumission in church (*manumissio in sacrosancta ecclesia*).⁵

6. The distinction between three kinds of manumitted introduced by the *lex Ælia Sentia* and the *lex Junia Norbana* was abolished by Justinian. He abolished the *dedititia*⁶ and the *latina libertas*,⁷ and in most cases substituted the *romana libertas* for them.⁸ He also abolished the *lex Furia Cassia*⁹ and allowed a manumission by last will to one who was not aged twenty years, at first to him who was aged seventeen years¹⁰ and subsequently to all that could testamentate.¹¹

7. And finally Justinian in the 78th Novel, as he allowed the manumitter to reserve the right of patronage,¹² placed the manumitted and freeborn universally equal, as this had been permitted in part in single cases by imperial privileges, usually under the name *jus aureorum annulorum*.¹³

2. MEN IN THEIR OWN RIGHT AND SUBJECT TO ANOTHER'S POWER (*Homines sui juris et alieni juris*).

§ 133. An *homo sui juris* was one who was not subject to the power of another. Such a person was also termed *paterfamilias*. An *homo alieni juris*

¹ Ulpian, XIX. § 4.

² See note 7, *infra*; Gaius, I. §§ 22, 167; Ulpian, I. § 10; § ult. I. 3. 7 (3. 8); C. ult. § ult. C. 7. 6; *K. A. v. Vangerow*, über die latini Juniani, Marb. 1833.

³ Gaius, I. § 28-35, 65-75; II. § 142; III. §§ 5, 72, 73; Ulpian, III. Compare Gaius, III. §§ 5, 73.

⁴ See Ulpian, I. § 8. Manumission by *vindicta* already at the time of the classical jurists consisted only in a simple declaration of the master and of a governmental official in the presence of the manumitted: fr. 7. 8. 23. D. 40. 2.

⁵ C. Th. 4. 7; C. Just. 1. 13.

⁶ C. un. C. 7. 5; § 3. I. 1. 5.

⁷ C. un. C. 7. 6; § 3. I. 1. 5.

⁸ It was no longer necessary that the manumitted should attain the age of thirty years: Const. 2. C. 7. 15. The previous in *bonis esse* (ownership by the *jus gentium*) became changed to true quiritarian ownership: Const. un. C. 7. 25. Of the informal modes by which the *latina libertas* had previously been conferred, Justinian declared a number of them as sufficient for a perfectly effectual manumission, the others for the future were to be wholly ineffectual: Const. un. C. 7. 6. Respecting the cases of the former *dedititia libertas* see note 6, *supra*.

⁹ Tit. C. 7. 3; Tit. I. 1. 7.

¹⁰ § 7. I. 1. 6.

¹¹ *Pactus*, Instit. § 215, note h.

¹² Novel 119. c. 2.

¹³ Tit. D. 40. 10. 11; Tit. C. 6. 8.

s. alieno juri subjectus was one who was subject to another's power, whether he be free or not.¹ Only an *homo sui juris* could possess all rights in himself and have power over others. The *homo alieni juris*, at least according to the more ancient law, even if he were not a slave, could not own property, but all that which he had on entering into this state, or acquired since, belonged to him to whose power he was subject; nor could he have power over another.² The power which an *homo sui juris* could have over others was threefold:

1. *Potestas*, which was the power of the master over slaves (*potestas dominorum*), as also the paternal power over children and grandchildren of sons, etc. (*patria potestas filiifamilias*).

2. *Manus*, the power of the husband over his wife, with whom he lived in strict Roman marriage.³

3. *Mancipium*, a power similar to the power of the master over slaves, which one acquired over another's freeman from the former possessor of the paternal power or *manus* by a formal sale and delivery (*mancipatio*), and which also especially served for *emancipatio* and *datio in adoptionem*. The law of Justinian retains only the power of the master over slaves and the paternal power.⁴

3. CIVIL REPUTATION.

a. General Idea.

§ 134. Reputation consists in the esteem which one enjoys among others for his character, and in the external acknowledgment of his worth springing from it. As far as such esteem and acknowledgment depend solely on the judgment of the public it is called natural reputation, or good name. Civil reputation, which differs from this, consists in a man being a citizen of a state, and therefore can claim all rights and advantages which pertain to such citizen. Hence civil reputation is a consequence of the characteristics of citizenship.⁵ As it proceeds solely from the state and rests on its acknowledgment, therefore its deprivation or diminution can only be by the state and by its law, and not by the simple opinion of another respecting a man's worthiness or unworthiness.

¹ Gaius, I. § 48-141; Ulpian, tit. 4, 5; Inst. I. 8; Dig. I. 6; Hugo, Rechtsg. p. 131; Zimmermann, Rechtsg., Vol. 1, § 122.

² Gaius, II. § 86-96; III. § 163-167; Ulpian, XIX. 18; Inst. II. 9; III. 28. (29). The condition of the *homo alieni juris* as *filiusfamilias* became gradually changed, so that by the Justinian law he could own property nearly as fully as an *homo sui juris*.

³ The *manus mariti* was modelled after the transitory *manus coemptioris*.

⁴ The *patria potestas*, *manus* and *mancipium* are more particularly treated in the domestic law. The Roman doctrine connected therewith of the *familia* and of the *capitis diminutio* (especially the *minima*) will be considered in § 144, *infra*.

⁵ A positive law which recognizes persons not citizens as subjects of rights must also allow to them a right to certain worthiness, which can only be wholly lost by the loss of personality. This worthiness, joined with simple personality, even without the right of citizenship, is generally designated civil reputation, though not so termed.

b. According to the Roman Law.¹

§ 135. The civil reputation which belonged to the Roman citizen as such² was termed *existimatio*. He whose reputation was inviolate was said to be in the *status illæssæ dignitatis*.³ This status was the condition of the perfect capacity, or rather worthiness, of the Roman citizen for all political and civil rights as determined by the Roman public and private law. Now the *existimatio* might either be wholly lost or simply diminished.

A. Wholly lost (*existimatio consumitur*). This was always a consequence of the loss of citizenship, which was the condition annexed to all *existimatio*.⁴

B. Or because of reprehensible conduct it might be *simply diminished* (*existimatio minuitur*). The consequence of such a diminution was always only the loss of some of the rights of citizenship.⁵ Among the persons who were not in the full enjoyment of civil reputation were those who, on account of their infamous avocation, or because of the commission of crimes, were expressly designated by the prætorian edict or by a law as infamous, *qui infamia notantur*.⁶ The moderns term it *infamia juris*. But a further distinction was also made.

a. In some cases it was termed *notatur qui fecerit*, i. e., the infamy ensued as soon as it was certain that one had committed the infamous act or had entered into the infamous avocation, and this without the necessity of a previous judicial investigation or condemnation, which in many cases of this kind was necessary (so termed *infamia juris immediata*). To this class belonged professional actors and gladiators;⁷ procurers and procuresses (*qui lenocinium faciunt*);⁸ public courtesans (*quæ palam quæstum faciunt*);⁹ adults who violated a compromise voluntarily entered into, confirmed by oath;¹⁰ usurers;¹¹ they who were betrothed or married to several persons at the same time;¹² widows who married before the expiration of their year of mourning;¹³ guard-

¹ *Donellus*, comm. jur. civ. Lib. 18. c. 6; *Marezoll*, über die bürgerliche Ehre, Gießen, 1824; *Savigny*, System, Vol. 2, p. 170, seq.; Supplement 7, p. 516.

² See note 4.

³ fr. 5. § 1. D. 50. 13.

⁴ fr. 5. §§ 2. 3. D. 50. 13. This passage, as it stands in the Pandects, is contradictory, because the words "*cum libertas adimitur*" do not accord with the expression "*magna capitis diminutio*," nor in any event with the example of deportation.

⁵ fr. 5. § 2. D. 50. 13.

⁶ Of political rights, see fr. 1. pr. D. 48. 7; fr. 40. D. 47. 10; Const. 2. 12. C. 12. 1; fr. 1. §§ 5. 6. D. 2. 1; fr. 4. D. 47. 23; fr. 4. 8. D. 48. 2; fr. 1. 2. D. 1. 22. Of private rights, see fr. 18. § 1; fr. 20. § 5; fr. 26. D. 28. 1; fr. 14. 15. D. 22. 5; fr. 64. D. 23. 2; Const. 27. C. 3. 28.

⁷ Dig. 3. 2; Cod. 2. 12; *Glück*, Comm. Vol. 5, § 374, seq.; *Savigny*, System, Vol. 2, § 16, seq., and Supplement 7, p. 516, seq.

⁸ fr. 1. § 6. D. 3. 1; fr. 1. fr. 2. § ult. fr. 3. D. 3. 2.

⁹ fr. 1. fr. 4. §§ 2. 3. D. 3. 2; fr. 43. § 6-9. D. 23. 2.

¹⁰ fr. 24. D. 3. 2; fr. 41. pr. fr. 43. pr. § 1-5. D. 23. 2.

¹¹ Const. 41. C. 2. 4.

¹² Const. 20. C. 2. 12.

¹³ fr. 1. fr. 12. § 1-4. D. 3. 2; Const. 2. C. 5. 5; Const. 18. C. 9. 9.

¹⁴ fr. 1. 11. § ult. fr. 12. fr. 13. pr. D. 3. 2; Const. 2. C. 5. 9.

ians who married their minor wards, or married them to their sons, in which case the latter also became infamous;¹ wives who were caught in the act of adultery;² insolvents who did not voluntarily surrender their property to their creditors, but obliged them to institute proceedings in bankruptcy for it (*missio creditorum in bona*);³ and lastly, soldiers who were dismissed the service in disgrace (*ignominie causa*).⁴

b. In other cases it was said, *notatur qui damnatus erit, i. e.*, the infamy was the consequence of condemnation⁵ (so termed *infamia juris mediata*). This was the case in all *delictis publicis* (crimes) and in some *extraordinariis*,⁶ and in some *delictis privatis* (crimes against the person), especially theft, rapine and slander, in which also he became infamous who compromised with the injured party in order to prevent him from prosecuting.⁷ Finally infamy ensued when one was condemned in a contract that implied especial personal confidence, such as *mandatum*, *depositum* and partnership, or in the quasi-contract of guardianship.⁸ It has the following connection with the *infamia facti* of the modern jurists: There are various relations on which it more or less depends whether the previous conduct of a person was blameless or not, as in the transfer of a public office, or in the determination of the credibility of a witness. In what the fault must consist to be vicious has not been legally determined: it must rather depend on the impressions of the judge who has to determine it whether the charge against a person is sustained. Criminal charges which are proven now are designated by the modern jurists *infamia facti*. In the sources other terms are employed for this, which are not technical. The word *turpitudine* especially is frequently used.⁹ The term *levis nota*,¹⁰ which is once used,¹¹ relates to the so-termed *infamia facti*, and signifies a less degree of it.¹²

¹ fr. 66. pr. D. 23. 2; Const. 7. C. 5. 6.

² fr. 43. §§ 12. 13. D. 23. 2.

³ Const. 11. C. 2. 12; Const. 8. C. 7. 71.

⁴ fr. 1. fr. 2. pr. § 1-4. D. 3. 2; Const. 3. C. 12. 36.

⁵ Generally the infamy need not be mentioned in the judgment.

⁶ fr. 1. D. 3. 2; fr. 7. D. 48. 1; fr. 1. 4. D. 47. 15; fr. 1. fr. 3. pr. D. 47. 12; fr. — D. 47. 10; fr. 4. § 4. D. 3. 2; Const. 12. C. 2. 12.

⁷ The same rule prevailed in case of the *actio de dolo*: § 2. I. 4. 16; fr. 1. fr. — § 5. D. 3. 2; fr. 7. D. 48. 1.

⁸ § 2. I. 4. 16; fr. 1. fr. 6. §§ 5. 7. D. 3. 2; fr. 56. D. 17. 2. The guardian also became infamous by dismissal for *dolus*: § 6. I. 1. 26; fr. 3. § 18. fr. 4. §§ 1. 2. — 26. 10; Const. 9. C. 5. 43.

⁹ fr. 3. pr. D. 22. 5; fr. 2. D. 37. 15; fr. 12. D. 50. 2; Const. 2. C. 12. 1; Const. 27. C. 3. 28.

¹⁰ In the Const. 27. C. Just. 3. 28, it is, notwithstanding, termed *levis nota macula*; however, the word *macula* relates not only to *levis nota*, but also to *infamia et turpitudinis*.

¹¹ Namely, in Const. 3. C. Th. 2. 19, and in Const. 27. C. Just. 3. 28, composed out of this passage and out of Const. 1. C. Th. 2. 19.

¹² The meaning of Const. 27 is that the brothers and sisters of the testator who

It is erroneous¹ to apply this designation to those who, because of their low rank or their descent, were less regarded by the Romans, and for this cause were not equal in a legal, and especially in a public and penal, view to other persons.

III. OTHER DISTINCTIONS BETWEEN MEN.

§ 136. Besides those characteristics of men (§ 130–135, *supra*) on which, according to the Roman law, the natural and civil ability for rights depended, there are other qualities and relations to be considered in a juridical sense, which either form the condition for the enjoyment of certain rights or which otherwise have an influence on rights. Of these characteristics and relations only those will be considered which the Roman law deems the most important.

1. WITH RESPECT TO SEX.

§ 137. With respect to sex, persons are either males or females. There are others whose sex is doubtful, viz., hermaphrodites. Should such a case occur, it is assigned to the sex which it most resembles.² Generally both sexes have equal rights. According to the more ancient Roman law, females who were *sui juris* in general were under tutelage for life, and in many respects were treated as minors; but this is subject to many exceptions.³

2. WITH RESPECT TO AGE.⁴

§ 138. With respect to age, persons are either majors or minors⁵ (*maiores aut minores XXV. annis*). A major is one who has attained the age of twenty-five years, without distinction of sex.⁶ Minors are either pubescent (*puberes, adulti, adolescentes*) or children impubescent (*impuberes*).⁷ Males at least are of the same father with him have a right to contest the testament wherein they have been deprived of their birthright portion, so far as any person has been preferred to them whose reputation is even slightly blemished (and besides which they may contest it if a manumitted person has been preferred): *Savigny*, System, Vol. 2, p. 223, connected with p. 187.

¹ *Heineccius*, de levis notæ macula, Halle, 1720, and in his works, p. 266.

² fr. 10. D. 1. 5. An application of this is in fr. 15. § 1. D. 22. 5.

³ fr. 9. D. 1. 5; fr. 1. § 5. D. 3. 1; fr. 1. 2. D. 16. 1; fr. 16. 18. D. 26. 1; fr. 20. § 6. D. 28. 1; § 10. I. 1. 11.

⁴ See *Zimmern*, Rechtsg. Vol. 1, §§ 120, 121; *Savigny*, System, Vol. 3, p. 22–90.

⁵ This distinction was first introduced by the *lex Platoria* before A. U. C. 570. See *Savigny* on the *lex Platoria* in his miscellaneous writings, Vol. 2, No. 18.

⁶ Const. 5. C. 6. 45. Yet, exceptionally, a minor is considered as of full age when he attains the *venia ætatis*, i. e., if declared by the regent to be a major; for which it is requisite that males should have attained the age of twenty and females the age of eighteen: Const. 2. C. 2. 45; *Scheffer*, de *venia ætatis*, Strasburg, 1782; *Glück*, Comm. Vol. 31, p. 144, seq.

⁷ The Romans always made this distinction: *Savigny*, System, p. 24. The *impubes* when an *homo sui juris* is termed *pupillus*: fr. 239. pr. D. 50. 16. The period of impubescence is also termed *prima ætas*, and the period from pubescence to majority, *secunda ætas*: Const. 30. C. 1. 4; Const. 10. C. 6. 26; Novel 72, præf.

become pubescent when they have attained the age of fourteen, females on completing their twelfth year.¹ Children before their seventh year are termed infants,² without distinction of sex. From the seventh year to pubescence they are termed either *infantix* or *pubertati proximi*, according as they are nearer to the age of infancy or puberty.³ Old age (*senectus*), which relieves from the charge of public office, begins with the completion of the seventieth year.⁴

3. WITH RESPECT TO HEALTH.

§ 139. With respect to health :

1. As regards the body, persons are either healthy or diseased (*morbo laborantes*),⁵ or infirm, *i. e.*, laboring under some chronic physical defect (*vitio laborantes*).⁶

2. As regards the condition of the mind, persons are either such as have the full use of their reason, or such as have not, and lack freedom of will. The latter, according to the character of their mental disease, are either maniacs (*furiosi*) or lunatics (*dementes*).⁷ In this class,

¹ pr. I. 1. 22; Const. 3. C. 5. 60; *Cramer*, de pubertatis termino, Kiel, 1804; *Savigny*, System, p. 55, *seq.* Respecting the *pubertas plena*, mentioned in § 4. I. 1. 11; fr. 40. § 1. D. 1. 7, and of which there are applications in fr. 14. § 1. D. 34. 1; fr. 57. D. 42. 1; Novel 115. c. 3. § 13, see *Dirksen*, Beiträge, p. 289.

² Const. 18. pr. § 4. C. 6. 30. See fr. 14. D. 23. 1; fr. 1. § 2. D. 26. 7; Const. 8. C. Th. 8. 18. An infant is one who cannot yet talk: fr. 65. § 3. D. 36. 1; fr. 70. D. 45. 1; Const. 26. C. 8. 54. How this should be understood, see *Glück*, Comm. Vol. 30, p. 432, *seq.*, and *Savigny*, System, § 107.

³ fr. 111. pr. D. 50. 17; § 10. I. 3. 19 (20); § 18. I. 4. 1; fr. 14. D. 29. 5. The sources do not speak clearly respecting the boundaries, and hence it is very doubtful whether the period from the completed seventh year till the completed fourteenth year (with girls the completed twelfth) should be simply halved or whether in each particular case the maturity of the individual should be regarded, or whether a distinction should be made between those who approximate childhood, about the eighth year, between those who approximate puberty, about the last year of their impubescence, and between those who are in the middle between these two classes, and regard individual maturity only in the latter. See *Jac. Gothofredus*, in Comm. ad Tit. D. de R. J. ad L. 111, who collects the older opinions; *Savigny*, System, p. 36, *seq.*

⁴ § 13. I. 1. 25; fr. 2. pr. D. 27. 1; fr. 3. D. 50. 6; Const. 10. C. 10. 31; Const. un. C. 5. 68. It is not contradicted by Const. 3. C. 10. 49.

⁵ A sickness which unfits for all business is termed severe sickness (*morbus soniticus*): fr. 113. D. 50. 16; fr. 65. § 1. D. 21. 1; fr. 60. D. 42. 1.

⁶ fr. 101. § 2. D. 50. 16. In these are included the impotent and castrated: fr. 128. D. 50. 16; fr. 6. § ult.; fr. 7. D. 21. 1; fr. 39. § 1. D. 23. 3; fr. 6. pr. § 1. D. 28. 2; fr. 40. § 2. D. 1. 7; § 9. I. 1. 11. Likewise the deaf and mutes and they who are both: § 2. I. 2. 12; fr. 1. § ult. D. 44. 7; fr. 1. § 3. D. 3. 1; fr. 4. D. 29. 1; Const. 10. C. 6. 22.

⁷ fr. 8. § 1. D. 26. 5; C. 25. C. 5. 4. But in a legal aspect there is no difference between these two kinds of mentally diseased, and both of the Latin terms mentioned are often used as synonymous, *e. g.*, Cicero Tusc. Quæst. 3. 5. and in fr. 7. § 1. D. 27. 10. Maniacs and lunatics are forbidden the management of property the same

in certain respects, are included the purely weak-minded (*stultis, futuri, insani*),¹ and silly persons (*simplices*).²

4. WITH RESPECT TO KIN.

a. Definition.

§ 140. By consanguinity and kinship (*cognatio*) is understood the connection between two or more persons founded on procreation. True kinship requires that several persons be connected with each other through the same blood. There are, however, circumstances wherein certain persons who are not true kin are regarded legally as if they were. On this is founded the division of kinship into true or bodily and fictitious. According to the Justinian law the latter is founded only on adoption.³ At present the former will be treated of.⁴

b. Manner of Kinship.

§ 141. In consanguinity one person descends from another immediately or mediately through an intervening person, or persons descend from a common third person. The first case is that of kindred in a direct line (*linea recta*); those persons who are related to each other in a direct line are termed ascendants and descendants,⁵ according as we count upwards from the child to the parent (*linea superior s. ascendens*) or downwards from the parent to the child (*linea inferior s. descendens*). The second case is that of the collateral line (*linea transversa s. obliqua*).⁶ And they who are only thus related by descent from a common ancestor are termed collateral kin (*ex latere venientes*, in modern Latin *collaterales*).⁷ The whole of the kindred as judicially adjudged prodigals are: fr. 1. pr. D. 27. 10; § 3. 4. I. 1. 23. See the doctrine of tutor and curatorship.

¹ § 4. I. 1. 23; C. 25. C. 5. 4.

² fr. 25. § 1. D. 22. 3; fr. 3. § 18. D. 26. 10; fr. 6. § 19. D. 27. 1. See, also, the doctrine of Error.

³ fr. 4. § 2. D. 38. 10. According to the older Roman law the *conventio in manum mariti* and even the *mancipatio* of a free person had the same effect as adoption. See §§ 133 *supra* and 144 *infra*. The canon law has a spiritual relationship (*cognatio spiritualis*) (but which is not recognized by Protestants) which arises from baptism; but according to the moderns it only arises between the baptizer and sponsor on the one hand and the christened child and its parents on the other. A similar kinship arises from religious confirmation: Decret. Gregor. Conc. Trident. Sess. 24. c. 2. de reform matr.

⁴ Inst. 3. 6; Dig. 38. 10; Decretal. Gregor. IX. Lib. 4. tit. 12. 14. 17.

⁵ By the Romans usually *parentes* and *liberi*.

⁶ fr. 9; fr. 10. § 9. D. 38. 10. The canon law further distinguishes between equal and unequal collateral lines, according as collaterals are equally or unequally distant from their common ancestor.

⁷ Const. 9. § 1. C. 5. 27; Novel 118. c. 2. 3. The kinship between persons, one of whom is descended immediately from the common ancestor, while the other is descended from the same ancestor in a more remote degree, is designated by the later jurists with the barbaric term *respectus parentalis*. The Romans say of persons who are thus related *parentum liberorumve locum obtinent*: § 5. I. 1. 10.

descended from a common ancestor (the *stipes communis*) are termed a stock (*stirps*), which again may be divided into several stocks.

c. *Degrees of Kindred.*

§ 142. The proximity of kinship is computed by degrees. According to the computation prescribed by the Roman law, each generation constitutes a degree; and on this is founded the rule that the number of generations between certain persons determines the number of degrees between them (*tot sunt gradus, quot sunt generationes*).¹ Hence father and son are related in the first degree, grandfather and grandchild in the second, brother and sister in the second, uncle and nephew in the third, cousins in the fourth degree, and so on.²

d. *Legitimate and Illegitimate Kindred.*

§ 143. Blood kinship is either legitimate or illegitimate according as it is founded on procreation in lawful marriage or on procreation without marriage. In regard to illegitimates³ the Roman law distinguishes between—

1. *Naturales*, who were begotten in lawful concubinage;⁴ and,
2. All illegitimate children (*vulgo quæsitæ et spurii*).⁵

Of the latter are those begotten incestuously (*ex damnato coitu*), which the moderns term *incestui*, and those begotten in adultery, which are termed *adulterini*.

e. *Agnates and Cognates.*

§ 144. All blood kindred are termed Cognates, in its wide sense. An important class of them in the Roman law are the Agnates;⁶ that is, those that belong to the same house, family (*familia*). Other kin are termed simply Cognates,⁷ or Cognates in a narrow sense.⁸ The Roman family con-

¹ The canon law in the computation of degrees in lineal consanguinity follows the Roman law; but in collateral consanguinity it has the following rule: Collateral kin are related to each other in the same degree that they are related to the common ancestor. However, for more certainty in unequal collateral lines the number of degrees in both lines is generally given: Const. 2. C. 35. qu. 5. Among the modern writers see *Glück*, Comm. Vol. 23, §§ 1209, 1210; *Roszhirt*, Erbrecht, p. 479.

² fr. 1. § 3-7; fr. 3. D. 38. 10.

³ Their and their descendants' status as to their mother and her kin is the same as if they were legitimate; on the other hand legally they have no father, and consequently, if not legitimate, are not related to his kin: § 12. I. 1. 10; fr. 5. D. 2. 4; fr. 4. D. 38. 8.

⁴ The term *liberi naturales* signifies in the Roman law—

1. Children by concubinage in contradistinction from children by marriage, *e. g.*, tit. C. de natural. liberis (5. 27), Novel 89. cap. 12.

2. Children of the body in contradistinction from adopted children, *e. g.*, § 2. I. 3. 1.

⁵ § 12. I. 1. 10; fr. 23. D. 1. 5.

⁶ *Deiters*, Diss. de civili cognatione, Bonn, 1825; *Buchholtz*, jur. Abhandl. No. 3.

⁷ fr. 10. §§ 2. 4. D. 38. 10.

⁸ *Gaius*, I. § 156; § 1. in f. I. 1. 15.

sisted always of the family father (*paterfamilias*) and all those who were under his paternal power,¹ be they sons or daughters or the children of sons or daughters, etc. The limited family was restricted to these latter persons, but not the extended family of which we are now treating. When several persons are not subject to the same paternal power, because he who would have possessed it is dead or has lost his freedom or at least Roman citizenship, then such persons are not members of the limited family, but of the extended family;² and those persons who are freed from paternal power by the conferring of an office or an honor, as a reward to them or as a punishment to the father of the house, still continue in the extended family,³ as also do those whose membership of the family was reserved at the time of their emancipation. The latter can occur only since the time of Anastasius, and only when the emancipation is in consequence of an imperial rescript requested for that purpose.⁴ On the other hand he who becomes a slave (*maxima capitis diminutio*),⁵ or, without loss of freedom, loses the Roman citizenship (*media capitis diminutio*), leaves even the extended family, because this can only consist of male and female Roman citizens.⁶ One who retains his citizenship may also change his family;⁷ and this occurs on every entry into the paternal power of a man out of another family,⁸ and also generally on

¹ fr. 195. § 2. D. 50. 16. One might say with all free persons who stand in his power. Under Justinian these were yet only the *fili*- and the *filiæfamilias*.

² fr. 195. § 2. D. 50. 16; fr. 6. D. 38. 7.

³ See, *infra*, the doctrine of the ending of the paternal power.

⁴ Const. 5. C. 8. 49.

⁵ Of the *capitis diminutio* or *deminutio* or *minutio*, treats—Gaius, I. § 158–163; Ulpian, XI. § 10–15; Inst. 1. 16; Dig. 4. 5. See thereon and on status, *Hugo*, *Rechtsg.* Vol. 1, p. 118, *seq.*; *Zimmern*, *Rechtsg.* Vol. 1, §§ 117, 118; *Savigny*, *Syst.* Vol. 2, § 68, *seq.*, and supplement VI. p. 443, *seq.*; *Böcking*, *Inst.* § 58. The leading passage on *capitis minutio* is fr. 11. D. 4. 5. There are three kinds of *capitis deminutio*—*maxima*, *media*, *minima*. Freedom, citizenship and family are requisite to the enjoyment of perfect status. The loss of all of these is the greatest change of status (*maxima capitis deminutio*). The loss of citizenship but the retention of freedom is the medium change of status (*media capitis deminutio*). But when freedom and citizenship are retained and the family only is changed, this is the least change of status (*minima capitis deminutio*).

⁶ Both of these first kinds of *capitis deminutio*, which in fr. 1. § 8. D. 38. 17, Ulpian terms *magna capitis deminutio* in contradistinction from the third, which he terms *minor capitis deminutio*, with the Romans produced civil death, i. e., he who ceased to be a Roman citizen lost all his rights according to the *jus civile* and in relation to them was regarded as dead: fr. 209. D. 50. 17; § 1. I. 1. 12.

⁷ Ulpian, XI. 13; Gaius, I. § 162; § 3. I. 1. 16; fr. 11. D. 4. 5; *Seckendorff*, *Diss. de cap. dem. min.*, Col. 1828; *Savigny*, *System*, Vol. 2, § 68, *seq.*, and supplement VI. p. 443, *seq.*

⁸ Respecting the individual cases of this kind see the doctrine of acquisition of paternal power. The entering into the *manus mariti* when it existed was connected with it. Gaius, I. § 162; III. § 82–84; IV. § 38. As also every entry into the *man-*
manus · Gaius I. § 162

the exit from the paternal power on the way to emancipation.¹ Sometimes the emancipated person, the same as an illegitimate, and every Roman citizen who does not with others belong to a family, originates for himself alone a family.² On comparing the foregoing with the doctrine of the acquisition of paternal power, it appears that the agnation is a kinship which rests on simple paternity, and that such kinship is only an agnation when it is not prevented by a *capitis diminutio*.³ According to the older Roman law kin as such were not instituted legal heirs or legal guardians, but only agnates were so instituted, which was gradually altered, till at length it was thoroughly changed by Novel 118. The doctrine of agnation is of practical importance also in the modern Justinian law,⁴ especially as, in adopted kinship, the adopted child and they who come into the paternal power of the adopted father with him enter into such father's family and continue therein till a loss of status (*capitis diminutio*).⁵

f. Collateral Consanguinity.

§ 145. Collateral consanguinity is either of the whole blood, as when it is founded on descent from the same couple, or it is of the half blood, as when it is founded on the descent from one of a couple, such one being the common ancestor. In the modern Roman law this distinction is important in the case of brothers and sisters and of nephews and nieces. Brothers and sisters of the whole blood are now generally termed *germani*,⁶ and of the half blood *consanguinei* when they have a common father,⁷ and *uterini* when they have a common mother. In modern Latin half-blood collaterals are also termed *unilaterales* or *ex uno latere juncti*.⁸

¹ See, e. g., fr. 3. § 1. D. 4. 5. The same rule prevailed as to the former emancipation out of the *manus* and generally as to the *manumissio ex mancipio*. See note 8, p. 133.

² fr. 194. § 2. D. 50. 16.

³ fr. 10. § 2. D. 38. 10; §§ 1. 3. I. 1. 15. As one who has lost his Roman citizenship cannot hold an agnate kinship, consequently he who was never a Roman citizen cannot hold such kinship.

⁴ See C. 8. 13. C. 3. 44.

⁵ See the doctrine of adoption.

⁶ *Hugo*, civil. Mag. Vol. 4, Nos. 7 and 16. The Romans termed that brother *frater germanus* who was of the common father irrespective of a common mother.

⁷ With the Romans *consanguineus* meant an agnate of the nearest degree in the collateral line, the brother of the full as well as of the half blood descended from the same father, and the former or the latter was only so termed when he was of the same family: § 1. I. 3. 2; fr. 2. pr. D. 38. 16; *Gaius*, III. 14; *Hugo*, civ. Mag. Vol. 4, p. 246.

⁸ Justinian terms brothers and sisters of the whole blood *ex utroque parente conjuncti*; of the half blood, *ex uno parente conjuncti sive per patrem solum sive per matrem*: Novel 118. c. 2. 3. See fr. 10. § 13. D. 38. 10.

g. *Simple and Complex Kinship.*

§ 146. Kinship is either simple or complex.¹ It is simple when persons are related to each other only in one way, and complex when they are related in several ways. Such complex relationship arises—

1. When children are begotten by a couple who themselves are related to each other.

2. By a couple who are both related to a third person.

The latter may occur in the following ways: When one person begets children with two other persons who were of kin to each other, or when two persons who are of kin beget children by two others who are also of kin.²

5. WITH RESPECT TO AFFINITY.

a. *Definition.*

§ 147. Affinity is the kinship which arises by marriage between one of a married couple and the kin of the other.³ Affinity applies, also, to step-relationship, but only so far as one step-kin is the married partner of the other's true kin.⁴

b. *Degrees of Affinity.*

§ 148. As the legal effect of kinship varies with its degree, so the legal effect of affinity depends on its proximity, and thus a person is more nearly affined to one of a married pair the nearer that person is of kin to the other of the married pair.⁵ The Roman law, however, does not compute the degrees of affinity.⁶ In place thereof⁷ are used sometimes the names of several kinds of affines, such as son-in-law or daughter-in-law (*gener*), father-in-law or mother-in-law (*socer*), etc.; sometimes designations such as "the affines of the wife or husband to the sixth degree," and sometimes "the wives or husbands of the affines to the sixth degree."⁸

¹ *Hugo*, Lehrbuch des heut. Röm. R., 7th ed. pp. 172, 185; *Glück*, Intestaterbfolge, 2d ed. §§ 19, 39, 40, 41.

² A double relationship arises when a civil relationship is added to the natural one; thus, when an ascendant adopts his descendant.

³ *fr.* 4. § 3. D. 38. 10. The Romans also term the kinship between husband and wife by marriage affinity: *fr.* 38. § 1. D. 22. 1; *fr.* 84. D. 23. 3; C. 15. C. 5. 3; O. un. C. 10. 35. But no affinity exists between the husband's and the wife's kin as such.

⁴ Step-parents and step-children are therefore affined to each other, but not step-brothers and step-sisters (*comprivigni*).

⁵ But the very nearest affinity exists between husband and wife, as is deducible from *fr.* 5. pr. D. 47. 10, wherein an affinity is spoken of which is nearer than between step-father and step-son and father-in-law and son-in-law.

⁶ *fr.* 4. § 5. D. 38. 10.

⁷ It could be only of such a substitute that Paul says in *fr.* 10. pr. D. 38. 10, "*Jurisconsultus cognatorum gradus et affinitas nosse debet.*"

⁸ *Fr. Vat.* §§ 216. 217. 298.

6. WITH RESPECT TO THE DOMICILE.

a. Definition.

§ 149. Domicile (*domicilium*) is that place which a person has made his permanent residence.¹ Such domicile is either voluntary (*domicilium voluntarium*) or compulsory (*domicilium necessarium*), according as the choice depends on one's will or as one is compelled by legal necessity to remain in a certain place.

1. In order to establish a voluntary domicile two things are requisite :

a. That a person actually takes up his abode in a certain place ; and

b. That he designs to remain there permanently so long as especial reasons do not determine him to leave it. One of these without the other is not sufficient,² and both are requisite to effect a change of domicile.³

2. A compulsory domicile have, viz., exiles at their place of banishment ;⁴ soldiers where they lie in garrison ;⁵ public officers at the place where their duties are to be performed ; wives at the residence of their husbands (*domicilium matrimonii*) ;⁶ and legitimate as well as adopted children, while under parental authority, at the residence of their father, unless, with their father's consent, they have established their domicile elsewhere.⁷

b. Presence and Absence.

§ 150. With respect to domicile a person is either present or absent. Every one is absent who is not at his residence ; and a person is regarded as absent who, though really present at his domicile, is prevented by some actual hindrance, such as imprisonment or insanity, from the prosecuting of his rights, or who cannot be proceeded against.⁸ Actual absence from the domicile is either compulsory or voluntary, and in the one as well as in the other case it is often of importance whether it is owing to a good or at least not censurable or a bad reason. Absence is divided into praiseworthy, blameless and dishonorable.⁹

7. WITH RESPECT TO CLASS AND AVOCATION.

§ 151. The difference in class and avocation has great influence on private rights. In the Roman law the military order occupy a pre-eminence among

¹ Dig. 50. 1 ; Cod. 10. 39 ; Glück, Comm., Vol. 6, § 512-514. They who have no fixed residence are termed in legal language vagrants.

² fr. 17. § 13. D. 50. 1. "Sola domus possessio, quæ in aliena civitate comparatur, domicilium non facit." See fr. 27. § 1. D. 50. 1 ; Const. 7. C. 10. 39.

³ fr. 20. D. 50. 1. "Domicilium re et facto transfertur, non nuda contestatione."

⁴ fr. 22. § 3. fr. 27. § 3. D. 50. 1.

⁵ fr. 23. § 1. D. 50. 1.

⁶ fr. 22. § 1. fr. 38. § 3. D. 50. 1. See fr. 5. D. 23. 2 ; fr. 65. D. 5. 1 ; Const. 9. C. 10. 39.

⁷ fr. 3. 4. fr. 6. § 1. fr. 17. § 11. D. 50. 1.

⁸ fr. 9. 10. 22. § 2. D. 4. 6. Sometimes absence comes into question which does not strictly depend on domicile : fr. 71. 73. pr. § 3. D. 5. 1 ; fr. 199. pr. D. 50. 16.

⁹ Dig. 4. 6 ; Glück, Comm. Vol. 4, § 467, seq.

the classes on account of the privileges possessed by the soldier (*miles*).¹ The sailors of the fleet were included in the military class which was thus privileged; but persons discharged from the service, recruits and persons connected with the army who were not soldiers were not entitled to such privileges.² In the Roman law the civilian was usually termed *paganus* or *privatus*.³

8. WITH RESPECT TO RELIGION.⁴

§ 152. With respect to religion persons are either Christians (*fideles*) or non-Christians (*infideles*). Christians are divided into orthodox (*orthodoxi*, *catholici*) and heretics (*haeretici*). By heretics is understood they who deny the doctrines of the Œcumenical Councils.⁵ The non-Christians are the Jews, heathen and they who have apostatized from the Christian religion. The laws of the Roman Christian emperors contain very severe enactments⁶ against apostates, heretics and Jews.⁷

IV. DEATH.

§ 153. The existence of a person is ended by death, which is either physical⁸ or civil (note 6, p. 133, *supra*). In regard to life or death is to be remarked—

1. Neither the life nor the death of a man is to be presumed.⁹

2. Should several persons die about the same time,¹⁰ so that it cannot be determined with certainty which died first, then,

¹ Dig. 29. 1 and 49. 16; Cod. 12. 36.

² *fr. un.* §§ 1. 2. D. 37. 13; *fr.* 4. 42. D. 29. 1; Const. 16. C. 6. 21.

³ Const. 19. C. 2. 3; Const. 1. C. 9. 24.

⁴ *Zimmern*, *Rechtsg.* Vol. 1, § 130.

⁵ Novel 131, c. 1.

⁶ Code I. 5. 7. 9. 11; Cod. Theod. XVI. 5. 7. 8. 10.

⁷ Cod. I. 9; Cod. Theod. XVI. 8; *Lecysson*, *Diss. de Judæorum*, Leyden, 1828.

⁸ Usually termed natural death, which term is also used in contradistinction from violent death.

⁹ This is determined by the general rules on the burden of proof; though it is often said that if it be once established that a man has lived he is held to be living till his death is proven. On the proof of death: *Leyser*, *medit. ad Pand. Spec.* 95 and 96; *Bülow*, *Abh.* Pt. 2, No. 26. However, according to the present common law of Germany an absent person, whose life or death is doubtful, may, on the application of an interested party, be declared dead by the judge, if it be proved that if he were still alive he would be aged seventy years. In the Roman law it is true the term of one hundred years is sometimes designated as the highest age of man; but *fr.* 56. D. 7. 1 relates only to the duration of a usufruct let to a corporation, and Const. 23. pr. § 1. C. 1. 2 relates only to prescription against churches and charitable institutions. In the German practice the passage in the 10th verse XC. Psalm, "the days of our years are threescore and ten," is usually referred to as the period of human life. *Glück*, *Intestaterbfolge*, 2d ed. § 2; *Gustering*, *Nachforsch.* Vol. 1, p. 388.

¹⁰ *Glück*, *Intestaterbfolge*, 2d ed. § 4; *Uedcke*, *de jure commorientium*, Rostock, 1830.

a. If it be a case of parents and children it is presumed, regardless as to the mode of death, that impubescent children died before and pubescent children after their parents.¹

b. If on the contrary it be a case of persons who are not parents and children to one another, and if the rights of one are dependent on the previous death of the other, as in the case of an inheritance or legacy, such rights cannot be made available without proof of the previous death of the party against whom it is claimed;² but if a person receive a gift from another, the irrevocability of which depends only on the fact that the other did not revoke the gift in his lifetime and the donee is also dead, then in case of doubt the donor is regarded as having died first, and the gift cannot be reclaimed, as, *e. g.*, the case of a gift between husband and wife or a *donatio mortis causa*.³

CHAPTER SECOND.

LEGAL PERSONS.

I. GENERAL DEFINITION.

§ 154. Though rights in general, and especially rights of property, are for individual persons, yet there are cases in which rights are permitted to things which are assimilated in a greater or less degree to individual persons, and which things may also have obligations. Besides the natural and physical persons there are things which are termed legal (moral, mystical or fictitious) persons. As such is designated everything other than a human being which is regarded by the law as a proper subject of rights. To this class belong,⁴ first, the state itself, and, when property is concerned, instead of the state the fiscus or state treasury (§ 156, *infra*), corporations of every kind (§ 155, *infra*), many pious and charitable institutions (*pix causæ*)⁵ (§ 157, *infra*), and, lastly, the estate of a deceased so long as it has not been acquired by the heirs (*hereditas jacens*).⁶

II. CORPORATIONS.⁷

§ 155. A corporation is a union of persons for the purpose of continuous succession in general beyond the life of its several members, and recognized by the state as a moral person. The corporation personifies an entirety, and

¹ Instances of this presumption are in fr. 9. §§ 1. 2. 4; fr. 16. pr. fr. 22. fr. 23. D. 34. 5; fr. 26. pr. D. 23. 4. An exception is contained in fr. 9. § 2. D. 24. 5, and in fr. 17. § 7. D. 36. 1.

² Instances may be found in fr. 9. pr. fr. 16. 17. 18. pr. D. 34. 5.

³ fr. 8. fr. 9. § 3. D. 34. 5; fr. 32. § 14. D. 24. 1; fr. 26. D. 39. 6.

⁴ Heise, Grundriss, 3d ed. p. 25, note 15; Savigny, System, Vol. 2, p. 235, *seq.*

⁵ Not all: see § 157, *infra*.

⁶ See § 737, *infra*.

⁷ Dig. III. 4. XLVII. 22. L. 1. 4. 5. 6. 8. 9; Cod. X. 40-68; XI. 29-39; Zimmermann, Rechtsg. Vol. 1, § 131; Weiske, über Corporationen, Leipsic, 1847.

hence is an individual subject of rights in itself entirely independent of the several members of it as physical persons.

1. Such a corporation can only arise by the authority of the state.¹

2. A corporation constituted in the proper manner continues always the same entirety or the same legal person, even if in the course of time its members should be changed.²

3. A corporation as a legal person may acquire and possess rights, and when validly constituted it possesses all the rights necessary for its continued existence, in which is included the right to receive new members and to choose officers, to have a common treasury, and to make by-laws.³ The government may also grant to corporations other special privileges, *e. g.*, a jurisdiction of its own, a right of succession in the intestate estate of its members, privileges and franchises.⁴

4. As a corporation may possess property, real rights, and claims, so it also may be subject to debts. These rights and obligations do not belong to the individual changing members of the corporation, but to the corporation itself, regarded as a legal person,⁵ though a right of use of certain corporate property, according to its peculiar purpose, may be vested in the individual members.⁶

5. The corporate affairs, which can only be such as relate to the common object and property of the corporation, must be managed by its constitutional representatives, as the corporation, being a fictitious person, has no natural will. If not otherwise prescribed this will is expressed by a resolution of the corporation. The manner in which this is effected depends on the constitution of the corporation. But if the constitution has no provisions on this matter, then all the members who have a vote must be convened, and whatever is then determined by a majority of the voters is to be regarded as the united will of the corporation, to which dissenters and absentees must submit. The Roman law, however, has no general provision on this matter.⁷

6. A corporation is dissolved when its last member leaves it or when the state dissolves it.⁸ In such case the corporate property, if the corporation were designed for public purposes, becomes the property of the state or of another legal person, to be applied to the same purposes; but if the corpora-

¹ fr. 1. pr. § 1. fr. 3. § 1. D. 47. 22; fr. 1. pr. D. 3. 4; Keller, Pand. § 39.

² fr. 7. § 2. D. 3. 4. ³ fr. 1. § 1. D. 3. 4. See fr. 1. § 2. fr. 18. D. 50. 4.

⁴ Const. 8. C. 6. 24. See § 681, *infra*.

⁵ fr. 7. § 1. D. 3. 4; § 6. I. 2. 1; fr. 6. § 1. D. 1. 8.

⁶ When these are applied to the general benefit they are termed *res universitatis* in a limited sense, in contradistinction from *patrimonium universitatis*, which could not be used by every one. The income of the latter was generally applied to the payment of the general expense. See § 170, *infra*.

⁷ fr. 160. § 1. D. 50. 17; Const. 5. C. 10. 63; Const. 3. C. 11. 31; Novel 120. c. 6. §§ 1. 2. It is generally supposed, when the constitution does not otherwise provide, that at least two-thirds of all the voting members of the corporation must be present, of whom a majority determine: Glück, Comm. Vol. 1, § 91.

⁸ fr. 7. § 2. D. 3. 4; fr. 21. D. 7. 4.

tion were designed for private purposes, then its property is divided among the remaining members.

III. OF THE FISCUS.

§ 156. By *fiscus* is now understood the property of the state in contradistinction from the private property of the ruler, and when spoken of as a legal person the state itself, as the subject of property relations, is understood.¹ The *fiscus* with regard to legal relations is always viewed as a moral person. It has not only a right to all the ordinary and extraordinary state revenues, to which latter belong the *bona vacantia* (§ 682, *infra*), but there also pertain to it many prerogatives and privileges,² which will be noticed under their proper heads. In a contest between a subject and the *fiscus*, in doubtful cases the subject prevails.³

IV. OF PIOUS AND CHARITABLE PURPOSES (*pious causis*).

§ 157. The term *pia causa* denotes an institution for pious and charitable purposes or for the public benefit. This general name is given to every establishment whose object is the promotion of piety, the relief of necessitous persons, the diffusion of education and culture and the advancement of science and arts.⁴ Institutions of this kind are recognized as moral persons only when the state has approved or authorized them.⁵ Otherwise they lack the capacity for rights and cannot acquire property. Still the confirmation by the state may be subsequent to their foundation, and then it has a retroactive effect to the time of such foundation.⁶ If such *pia causa* be confirmed by the state, and thereby recognized as a moral person, it acquires every kind of property, *inter vivos* as well as *mortis causa*, as also many privileges.⁷

¹ Paul, Sent. rec. Lib. 5. tit. 12; Dig. 49. 14; Cod. Theod. 10. 1; Cod. Just. 10. 1; Härlin, Rechte des Fiscus, Ulm, 1810; Peregrini, de jur. et privil. fisci, Cologne, 1663.

² According to the Roman law and German judicial usage the regent and regentess possess the same prerogatives in regard to their private estates: fr. 6. § 1. D. 49. 14; Const. 3. C. 7. 37.

³ fr. 10. D. 49. 14. See Novel 161. c. 2 and Edict. Justin. 4. c. 2. § 1.

⁴ Cod. 1. 3; Novel 120; Glück, Comm. Vol. 39, p. 448, *seq.*, Vol. 40, p. 1, *seq.*; Savigny, Syst. Vol. 2, p. 262, *seq.*

⁵ *Contra*, Elvers, in his Theor. prakt. Erört., Göttingen, 1827, p. 157, *seq.* Some later jurists allege that according to the express words of Const. 46. pr. C. 1. 3. all kinds of *pia causæ* might be founded through mere private will by testamentary appointment as heir or legatee; however that constitution is not glossed, and is moreover only a *lex restituta*.

⁶ When, therefore, a *pia causa* is founded by testament it is regarded as capable of inheriting, though it be not authorized by the government till after the testator's death: arg. fr. 62. pr. D. 28. 5.

⁷ Const. 35. in fin. C. 1. 3; Const. 23. pr. C. 1. 2. Of alienation of their property see Novel 120. cap. 1. § 2. cap. 6. § 2. The benefit of restitution *in integrum* was first given to it by the canon law: cap. 1. 3. X. 1. 41.

THIRD DIVISION.

OF THINGS.

ORIGINAL NATURE OF THINGS.¹

§ 158. By a thing (*res*), in its original sense, is meant a body which can have no rights, but may be acted on by human will. Whether the body have life or not, such as animals, or if it want reason, yet in this sense it is regarded as a thing. Certain persons were accounted things because they were incapable of rights, hence they were the object, but not the subject, of rights. Such persons were slaves.² There are things in this sense which are not the subject of commerce (*quarum commercium non est*), and cannot be private property.³ Ordinary things may be the objects of private property, and form the chief portion of estates.

THINGS CORPOREAL AND INCORPOREAL.

§ 159. As property chiefly consists of things in their original sense, hence the Romans formed the technical usage of terming all property effects things in their wide sense, such as servitudes, money, debts and inheritances. Herein is the distinction between corporeal things (*res corporales*), by which is meant things in their original sense,⁴ and incorporeal things (*res incorporales*), under which is meant rights of property in things aside from ownership of them.⁵

I. MOVABLE AND IMMOVABLE THINGS.

§ 160. Corporeal things are either movable (*res mobiles*) or immovable (*res immobiles*). Immovable are land⁶ (*solum*) and that which is connected therewith either by nature or art (*quæ solo continentur*), such as trees⁷ and build-

¹ Of the nature and kind of things generally, see Gaius, II. 1-17; Inst. 2. tit. 1. 2; Dig. 1. 8; Westphal, System des Röm. Rechts, Leipzig, 1788.

² Ulpian, XIX. 1: "Omnes res aut mancipi sunt, aut nec mancipi. Mancipi res sunt—servi et quadrupedes," etc.

³ fr. 6. § 2. D. 1. 8, in which are included the *res divini juris*, the *res communes omnium* (§ 169, *infra*), the *res publicæ* (§ 170, *infra*). They cannot be estimated pecuniarily, fr. 9. § 5. D. 1. 8, and most of the legal transactions thereon are void. See fr. 83. § 5. D. 45. 1.

⁴ Cicero, Top. c. 5, designates them as "*res quæ sunt*" in contradistinction from "*res quæ intelliguntur*." See, on corporeal things, § 1. I. 2. 2; fr. 1. § 1. D. 1. 8.

⁵ §§ 2. 3. I. 2. 2. Theophilus ad §§ 2. 3. cit.; fr. 1. § 1. D. 1. 8; fr. 1. § 7. D. 35. 2; Cicero, Top. c. 5; Seneca, epist. 58; Hugo, Römisch. Recht. 7th ed. p. 37. Those things have frequently been regarded as incorporeal which individually (*species*) are corporeal, but only according to their kind (*genus*) form the objects of rights. (On *genus* and *species*, see § 161, *infra*.)

⁶ fr. 1. §§ 3. 4. 6. fr. 3. § 15. D. 43. 16; fr. 1. § 1. D. 7. 9.

⁷ Generally the plants rooted therein: fr. 40. D. 19. 1. Especially the pendant fruit: fr. 44. D. 6. 1. "*Fructus pendentes pars fundi videntur*."

ings.¹ Other corporeal things are termed movable, whether they be self-moving or not.² The divisions of land into parts are termed *prædia*,³ whether buildings be thereon or not.⁴ The term *fundus* sometimes means only a *prædium* of the latter kind,⁵ and frequently every kind of *prædium*.⁶

II. GENUS AND SPECIES. FUNGIBLE AND NON-FUNGIBLE THINGS.

§ 161. By *genus* is understood in legal language not simply a whole class of things, but rather a single thing, which is designated only according to the class to which it belongs, and as such forms the object of right; *species*, on the contrary, is applied to a single thing which is designated by its individuality.⁷ On this distinction rests the division of things into fungible and non-fungible. Their natures are relative. A thing is fungible when the transaction of which it is the object depends not on its species, but on its kind and quantity, so that it need be only restored in class (*genere*) or in the same quantity and quality. A thing is non-fungible when the transaction of which it is the object must be performed or given in specie. This distinction is not limited to movable things only. Immovable things are sometimes regarded as fungible, as, *e. g.*, I devise to a person a piece of land of a certain size, or one of my houses (§ 765, *infra*). But only those things which are especially fungible are classified among the movables, and they are such as in the daily trade and traffic are usually measured, counted and weighed (*quæ pondere, numero, vel mensura constant*). These are termed fungible things in a strict sense,⁸ or naturally fungible. As things of another nature as a class (*genus*) may be the object of a transaction, so things of this kind may be species.⁹ Not all the things which can be weighed, counted or measured, but only many kinds of them, are things which are consumed by use¹⁰ (*res*,

¹ fr. 7. § 10. D. 41. 1; fr. 44. § 1. in f. D. 44. 7; fr. 50. D. 9. 2.

² When they are self-moving they are termed *res se moventes*: fr. 93. D. 50. 16.

³ fr. 115. D. 50. 16.

⁴ The terms *prædia rustica* and *urbana* refer to this distinction in the doctrine of servitudes. See, *e. g.*, fr. 198. D. 50. 16; but also see fr. 4. § 1. D. 20. 2.

⁵ Namely, in the Twelve Tables; Cicero, *Top. c. 4. pro. Cæc. c. 19*; but also in Gaius, II § 42; Ulpian, XIX. § 1; § 2. I. 2. 4; fr. 66. § 2. D. 18. 1; fr. 1. §§ 3. 6. D. 43. 16.

⁶ fr. 60. 115. 211. D. 50. 16, where the terms *locus, ager, area, sedes, villa* and *superficies* are spoken of.

⁷ fr. 54. pr. D. 45. 1; fr. 30. § 6. D. 30.

⁸ Of them it is said in fr. 2. § 1. D. 12. 1, "in genere suo magis recipiunt functionem per solutionem, quam specie," from which has been formed the unroman term *res fungibiles*. See I. 3. 14. (15).

⁹ *E. g.*, fr. 30. § 6. D. 30: "If the money which is in the chest or the wine which is in the vault." This especially applies to money. See fr. 24. D. 16. 3; fr. 34. § 4. D. 30; fr. 4. D. 13. 6; fr. 37. D. 45. 1.

¹⁰ Dig. 7. 5, de usufructu earum rerum quæ usu consumuntur vel minuuntur. The phrase *res usu consumptibiles* appears in a Latin translation of a Greek codicil in fr. 101. pr. D. 32.

quæ usu consumuntur), that is, they possess the characteristic of being consumed by ordinary use or being wholly lost to the user.¹

III. INDIVIDUAL THINGS AND THINGS TOGETHER (*universitates rerum*).²

§ 162. One or more individual things considered by and in themselves are termed in legal language *res singulæ* or *singulares*, and these are either simple, when consisting of naturally coherent, homogeneous parts (*corpus unitum*), or connected (*res connectæ*), even if they consist of different parts mechanically connected.³ Several individual things not mechanically connected, but which, when taken together, in a legal aspect are regarded as a whole, are termed *universitas rerum*,⁴ in which there is usually a further distinction between *universitas facti* and *juris*. By *universitas facti* is meant a number of corporeal things of the same kind which are regarded as a whole; *e. g.*, a herd, a stock of wares.⁵ By *universitas juris*, on the other hand, is meant a number of things of all kinds, corporeal as well as incorporeal, which, when taken together, are regarded as a whole; *e. g.*, an inheritance, a *peculium*.⁶ This distinction is in itself unobjectionable, but it is incorrect to maintain that the totality of law but not the totality of fact was subject to the rule, "*res succedit in locum pretii et pretium in locum rei*;"⁷ that is, all that is acquired by means of and instead of the single things pertaining to the totality belongs to the latter, and may be claimed by him who has a right to the totality.

IV. DIVISIBLE AND INDIVISIBLE THINGS.

§ 163. Things are either divisible or indivisible.⁸

1. A corporeal thing is physically divisible when without wholly destroying or injuring its value it can be divided into distinct parts, each of which in relation to possession, property or other rights forms a separate and independent whole. A movable thing can only by a change of its body be divided into several disconnected bodies.⁹ On the other hand an immovable

¹ The latter refers to money; the former to all other consumables.

² *Welcker*, jurist. Encycl. pp. 661, 662; *Wächter*, Handbuch, Vol. 2, § 39.

³ *fr.* 30. *pr.* D. 41. 3; *e. g.*, a house, a ship. The sources usually here also employ the expression *singulæ res* for the single constituent parts, and term the whole *universitas*: *fr.* 23. *pr.* D. 41. 3; *fr.* 7. § 11. D. 41. 1; *fr.* 8. D. 43. 24. And other single things, *e. g.*, a *fundus*, they term the whole, in contradistinction from the several parts (*e. g.*, several possession), *universitas*: *fr.* 30. D. 10. 3.

⁴ The Romans use neither *universitas rerum* nor *universitas personarum*, but use instead the word *universitas* simply without an affix. They only use such a term as *universitas ædium* in the cases mentioned in note 3.

⁵ § 18. I. 2. 20; *fr.* 13. *pr.* *fr.* 34. D. 20. 1; *fr.* 1. § 3. *fr.* 23. § 5. D. 6. 1.

⁶ § 6. I. 2. 9; *fr.* 1. § 1. D. 43. 2.

⁷ *fr.* 20. *pr.* §§ 1. 2. 10. 12. *fr.* 22. D. 5. 3.

⁸ *Buchholts*, *Versuche*, No. 4; *Wächter*, *Handbuch*, Vol. 2, § 42.

⁹ *fr.* 8. D. 6. 1; *fr.* 19. *pr.* D. 10. 3. If there be movable and immovable property to be divided among the same persons, then one thing may be given entire to one

thing can only be divided by the fixing of a boundary¹ by drawing a line on its surface, and that which is above or beneath a divided part of the surface appertains to such part. In immovables² a thing may be partly the exclusive possession or property of one person and partly the exclusive possession or property of another, and hence the Romans say,³ *rem pro diviso possidere, rem communem pro diviso habere*.

2. A corporeal thing is in contemplation of law divisible regardless whether it be physically divisible or not so far as it may be possessed by several persons in common, that is according to imaginary parts.⁴ Persons having a common possession or property are said to have *pro indiviso* or *rem habent communem*.⁵

V. THINGS EXISTING AND FUTURE (*res existentes et futuræ*.)

§ 164. With respect to their existence things are either existing (*res jam existentes*) or future (*res futuræ*), when their existence is only in anticipation, as when they depend on the ordinary course of nature, such as the coming fruits, or on chance, as a draught of fishes.⁶

VI. THINGS PRINCIPAL AND ACCESSORY.

§ 165. A principal thing (*res principalis*) is self-subsisting, and does not depend on or exist for another thing. All that which appertains to a principal thing or is rightfully connected with it is termed an accessory thing (*res accessoria*). To this class belongs that which the Roman law embraces under the term *causa rei* (the accessions of the thing) and also that which was expended on the thing (*impensæ in rem collatæ*).

A. CAUSA REI.

1. Accessions.

§ 166. Under *causa rei s. omnis causa* the Roman law comprehends all that the claimant of the principal thing can demand in addition to it from the defendant, and especially what he would have had if the thing had not been withheld from him. These are principally the accessions and fruits of the thing.⁷ Accession is the general name given to every accessory thing corporeal or person and another thing to another person. Respecting division of property in common see the doctrine of Actions of partition.

¹ fr. 8. D. 6. 1; fr. 6. § 1. D. 8. 4; fr. 43. pr. D. 41. 2.

² This ordinarily is not possible with movables: fr. 8. D. 6. 1. But see fr. 5. § 1. D. 6. 1; fr. 12. § 1; fr. 27. § 2. D. 41. 1.

³ fr. 5. § 16. D. 27. 9; fr. 8. D. 6. 1; fr. 29. D. 41. 1. See fr. 6. § 1. D. 8. 4; fr. 25. § 1. D. 50. 16.

⁴ *E. g.*, Property, usufruct, pledges.

⁵ See citations in note 3.

⁶ fr. 15. pr. D. 20. 1; fr. 11. § 3. D. 20. 4; fr. 8. pr. § 1; fr. 34. § 2. D. 18. 1; fr. 11. § 18. D. 19. 1; fr. 73. D. 45. 1; fr. 17. pr. D. 32; § 7. I. 2. 20; *Buchholts, Versuche*, No. 5.

⁷ fr. 20. D. 6. 1; fr. 35. 75. 246. § 1. D. 50. 16; fr. 31. pr. D. 12. 1.

incorporeal¹ which has accrued to a principal thing from without² and has been connected with it by natural or human agency, so that by virtue of this connection it is regarded as a part of the thing. (See § 275-277, *infra*.) Appurtenances, which differ from accessions,³ are such things as stand in an actual relation to another thing for the purpose of continually serving it without being so connected with it as to appear as a part thereof.⁴ The quality of appurtenance ceases by the total cessation of such actual relation, but not by the temporary cessation of it.⁵ Movables as well as immovables may have appurtenances,⁶ and such appurtenances again may either be movable or immovable.⁷ In relation to appurtenances the general principle is that every disposition respecting the principal affects the appurtenances to it also, unless they are expressly excepted.

2. Fruit.⁸

§ 167. Fruit in the proper sense of the term is the organic production of a thing,⁹ and all other physical gains from it,¹⁰ so far as this profit from and appropriation of the thing arises from its ordinary employment according to its purpose for use in contradistinction from diminution or encroachment.¹¹ As long as it remains united with the thing which produces it, it is termed hanging or standing fruit (*fructus pendentes* or *stantes*);¹² when it is separated from it it is termed severed fruit (*fructus separati*). When one who derives from the owner the right to enjoy the fruit of a thing, *e. g.*, the tenant or usufructuary, has separated it or acquired it after severance, the fruit

¹ Included in incorporeal accessions are, *e. g.*, Rights, which appertain to a thing: fr. 47-49; fr. 78. pr. D. 18. 1; or whereby other rights are secured: fr. 91. § 4. D. 45. 1; fr. 43. D. 46. 3; fr. 71. pr. D. 46. 1; § 5. I. 3. 20 (21); *Buchholtz, Versuche*, No. 6.

² See, however, § 167, note 9, *infra*.

³ See, generally, *Hommel, Pertinenz und Erbsonderungs-Register*, Leipzig, 1794; *Puncke, Lehre von den Pertinentien*, Chemnitz, 1827.

⁴ On the latter point see fr. 13. in fin. D. 19. 1; fr. 3. § 1. D. 33. 6.

⁵ fr. 17. § 11. D. 19. 1; fr. 41. § 12. D. 30; fr. 2. 42. § 4. D. 50. 16.

⁶ fr. 66. D. 32; fr. 15. D. 33. 6.

⁷ fr. 20. § 7. D. 33. 7; fr. 31. D. 32; fr. 13. § 31. fr. 14. fr. 17. pr. § 8. D. 19. 1.

⁸ *Heimbach, die Lehre von der Frucht*, Leipzig, 1843; *Savigny, System*, Vol. 6, p. 101. *seq.*

⁹ fr. 77. D. 50. 16. The *pertus ancille*, however, in the Roman law is not reckoned among the fruits, but among the accessions: fr. 28. § 1. D. 22. 1; § 37. I. 2. 1. In other places the word *fructus* means the right to enjoy the fruit from another's property, *e. g.*, fr. 33. pr. fr. 57. § 1. D. 7. 1; fr. 12. § 2. D. 7. 8.

¹⁰ fr. 7. §§ 18. 14; fr. 8. pr. D. 24. 3; fr. 18. pr. D. 23. 5; fr. 9. § 2-5; fr. 13. §§ 5. 6. D. 7. 1; fr. 77. D. 50. 16.

¹¹ Thus fruit trees do not belong to the fruit of a field, and forest trees belong only to the extent that they may be trimmed in accordance with the forest laws: fr. 10. 11. D. 7. 1; fr. 7. § 12. D. 24. 3.

¹² fr. 26. § 1. D. 47. 2; fr. 7. § 15. D. 24. 3; fr. 27. pr. D. 7. 1; fr. 44. D. 6. 1.

is termed perceived fruit (*fructus percepti*).¹ Fruit in an improper sense means the compensation which a man receives from another for the use or enjoyment of a thing and which does not consist in proper fruits, *e. g.*, interest, rent, etc.² Fruit in its proper sense is now termed natural fruit (*fructus naturales*).³ But revenue of the latter kind is termed civil fruit (*fructus civiles*).⁴

B. EXPENSES ON THE THING (*impensæ in rem collatæ*).

§ 168. As the plaintiff is entitled to demand, together with the principal thing, all its accessions (*omnem causam rei*), so on the other hand he is often bound to reimburse the defendant the *impensæ in rem collatæ*, by which is understood all that the latter expended on the thing for its benefit. If such expenses were necessary to keep the thing from perishing, or at least from deterioration, then they are termed necessary expenses (*impensæ necessariæ*). But if they were simply to improve the thing, or to increase the revenue from it, then they are termed useful expenses (*impensæ utiles*). Those expenditures which increase the desirability of a thing or the personal pleasure of the possessor are termed voluptuous (*impensæ voluptuariæ*).⁵ Reimbursement for the necessary expenses expended on another's property may generally be claimed by every one except a thief.⁶ Respecting the reimbursement of useful expenses, no general rule can be laid down, and with regard to the voluptuous expenses, generally there is a right of removal of the thing for which the expense was incurred (*jus tollendi*), but only when the thing is of some use after the separation from the principal and the owner does not prefer to compensate for it.⁷ An action for the reimbursement of such expenditures can generally be instituted only when they were made in consequence of an agreement or quasi agreement; in other cases the demand for reimbursement of expenditures can only be made available by means of exception or retention.⁸

¹ The distinction between severed and perceived fruit is distinctly recognized in fr. 13. D. 7. 4. See fr. 12. § 5. D. 7. 1; fr. 25. § 1. D. 22. 1; fr. 48. pr. D. 41. 1; Savigny, *Recht des Besizes*, § 22 a. See § 294, *infra*. Fruits which could have been obtained, but which are not because of the wrongful withholding of possession, are now termed *fructus percipiendi*: § 2. I. 4. 17; fr. 62. § 1. D. 6. 1.

² fr. 29. D. 5. 3; fr. 34. D. 22. 1. That interest does not properly belong to fruits is expressly shown by fr. 121. D. 50. 16. See fr. 36. fr. 38. § 13. D. 22. 1; fr. 62. pr. D. 6. 1; fr. 88. § 3. D. 35. 2.

³ With respect to these a distinction is made between the *fructus mere naturales* and *industriales*. See fr. 45. D. 22. 1; fr. 48. pr. D. 41. 1.

⁴ *Wächter*, *Handbuch*, Vol. 2, § 42.

⁵ fr. 79. D. 50. 16. See D. 25. 1; Ulpian, VI. § 14-17.

⁶ fr. 1. § 4. D. 33. 4; Const. 5. C. 3. 32; fr. 13. D. 13. 1; Const. 1. C. 8. 52.

⁷ fr. 38. D. 6. 1. See §§ 297, 567, 747, *infra*.

⁸ fr. 48. D. 6. 1; fr. 14. § 1. D. 10. 3.

VII. IN RELATION TO OWNERSHIP.

A. THINGS WITHOUT AN OWNER.

§ 169. As regards ownership, things are either without an owner (*res nullius*) or they are owned by some certain person (*res alicujus*).¹ To the things without an owner belong—

1. The things common to all (*res communes omnium*), *i. e.*, those things which are used and enjoyed by every one, even in single parts, but can never be exclusively acquired as a whole.²

2. The *res nullius* in a limited sense, *i. e.*, those things which, so far as is known, never yet had an owner or which have ceased to have an owner.³

3. *Res pro derelicto habitæ*, *i. e.*, those things to which the owner abandoned his ownership, without transferring it to another.⁴

B. THINGS PRIVATE, IN COMMON AND PUBLIC (*res privatæ, universitatis et publicæ*).

§ 170. Things that belong to a certain person may be owned—

1. Either by one or more individual persons, in which case they are termed private things (*res privatæ*).⁵

2. Or by a community, then they are termed things in common (*res universitatis*),⁶ or by a state, then they are termed public things (*res publicæ*). When in the last two cases the use and enjoyment of things according to their proper purpose is free to every member of the community, or to every subject of the state, they are termed *res universitatis*, and *res publicæ* in a narrow sense;⁷ but when they are destined merely to subserve the general purposes of the community or state, so that the revenue therefrom flows into the common or state treasury, they are termed *patrimonium universitatis* or *civitatis*.⁸

¹ Inst. 2. 1; Dig. 1. 8; Gaius, II. 1. *seq.*; Buchholz, Versuche, No. 7.

² § 1. I. 2. 1; fr. 2. § 1. D. 1. 8; fr. 51. D. 18. 1.

³ § 12-18. I. 2. 1. The Roman law includes the *res divini juris* among the *res nullius*, because they were partly sacred, partly religious and partly holy. In contradistinction, all other property was termed *res humani juris*, which might either be property owned or ownerless. Gaius, II. 2-9; § 7-10. I. 2. 1; fr. 1. pr. fr. 6. § 2-5. fr. 8. fr. 9. D. 1. 8. There are also things which are regarded as ownerless, such as an inheritance before it is entered upon and public property because it belongs to the entire community: fr. 1. pr. D. 1. 8; fr. 31. § 1. D. 28. 5; fr. 34. D. 41. 1.

⁴ § 47. I. 2. 1; Dig. 41. 7.

⁵ fr. 1. pr. D. 1. 8.

⁶ § 6. I. 2. 1; fr. 6. § 1. D. 1. 8.

⁷ fr. 15. D. 50. 16. The term *res publicæ* was often used by the Romans synonymously with *res communes omnium*, *e. g.*, §§ 2. 4. 5. I. 2. 1; fr. 4. 5. D. 1. 8.

⁸ In fr. 6. pr. D. 18. 1, this kind of public property is termed the people's property (*pecunia populi*), and is contradistinguished from that appropriated for public use as the field of Mars. See fr. 17. D. 50. 16; Höpfner, Comm. § 275.

FOURTH DIVISION.

OF TRANSACTIONS AND LEGAL MATTERS.

I. NATURE OF FACTS, TRANSACTIONS AND LEGAL MATTERS.

§ 171. A fact is generally every event regardless of its cause;¹ a transaction, on the other hand, is every occurrence caused by man as a rational being,² either by commission (*facto*) or omission (§ 373, *infra*). If a legal relation be founded, dissolved or changed by an act designedly or not designedly, then it is termed a juridical transaction, a particular kind of which are the legal transactions, that is, declarations of will by which legal relations may be founded, dissolved or changed or not, and these may be either unilateral or bilateral, according as they depend on the will of a single person; as in making a testament or on the concurrent wills of several persons, as in a convention.³

II. FORM OF LEGAL TRANSACTIONS.

§ 172. In every legal transaction the legal form must be observed. By this is meant the observance of all those legal precepts on which the validity of a legal transaction generally depends. These precepts relate partly to the contents and object of the legal transaction—in this case they are usually termed the internal form—and partly to the formalities to be observed on entering into them, when they are termed the external form. Hereto belong especially the reduction of the agreement to writing, the presence of witnesses, and the concurrence of the magistrate.⁴ The Roman law does not generally demand such formalities,⁵ but where they are required they must be observed under the penalty of annulment of the transaction.⁶ If it be doubted whether the external form was observed the burden of proof is on him who affirms that it was.

III. CONSTITUENTS OF LEGAL TRANSACTIONS.⁷

§ 173. The constituents of a legal transaction may be divided into three kinds, viz.:

¹ In a juridical view facts are divided into such as have actually happened and such as are presumed (*fictiones juris*), e. g., the *fictio legis Cernobiz* in fr. 12. D. 29. 1 and fr. 28. D. 28. 6. *Reiding*, Diss. de fictionibus apud Romanos, Groningen, 1829.

² Hence the transactions of a madman are regarded only as casualties: fr. 61. in fin. D. 26. 7.

³ *Buchholz*, jur. Abh. No. 9.

⁴ The confirmation of a legal transaction by public authority is such that it is either essentially requisite to the validity of the transaction, e. g., I. 1. 11; *Const.* 22. C. 5. 37; *Const.* 13. C. 5. 71, or it is only required for the purpose of greater security. By the latter alone a transaction invalid by itself cannot be rendered valid.

⁵ fr. 4. D. 22. 4; *Const.* 28. C. 2. 4.

⁶ *Const.* 5. C. 1. 14.

⁷ *Höpfer*, *Comm.* § 732.

1. That which is essential and without which it could not exist. In this, therefore, no change can be made, even by agreement.¹

2. That which is rightfully a natural consequence of a transaction, presuming it to have been actually completed in accordance with its essential requisites. This is therefore understood of itself without further agreement, though it may by special agreement be changed or entirely dispensed with, which must be proved by the party who relies on such agreement.²

3. The accidental accessory provisions of a legal transaction, by which is generally meant all that which in a legal transaction, whether it be by agreement or testament, is not tacitly understood, but must be expressly incorporated in it. To this class also belong the changes which may be made in the natural consequences of a legal transaction.³ He who rests on such accessory provisions must prove them, excepting where the completeness and validity of the transaction itself are made to depend on them, in which case his opponent must prove that the accessory provision did not apply or was performed.⁴

A. ESSENTIAL REQUISITES.⁵

1. *With respect to the Person.*⁶

§ 174. An essential requisite to the validity of a legal transaction is a person who has the power of effecting a change in his rights. For which it is necessary—

1. That he have the use of his reason and the power of will; hence,⁷ children, madmen and lunatics, excepting in lucid intervals,⁸ are incapable of engaging in a legal transaction.

2. That he be recognized by the state as a wholly independent person;

¹ If such a change, however, be made the consequences differ. See fr. 4. fr. 5. § 2. fr. 12. § 1. D. 23. 4; fr. 1. §§ 45. 46. D. 16. 3; fr. 36. 38. D. 18. 1; fr. 6. D. 41. 6. The essential constituents of a legal transaction are again divided into general, which are requisite in every transaction, and special, which distinguishes one kind of transaction from another kind.

² fr. 11. §§ 1. 2. D. 19. 1; fr. 5. § 4. D. 19. 5; fr. 24. D. 16. 3; fr. 3. D. 12. 1.

³ Respecting the accidental provisions, see § 183, *seq.*, *infra*.

⁴ When to a claim of rights emanating from a transaction a defence is set up that the transaction was conditional, the claimant must prove either that the transaction was unconditional or that the condition was performed: fr. 10. D. 45. 1; *Glossa ad Const.* 9. C. 8. 36; *Bethmann-Hollweg*, *Vers. aus dem Civilproc.* p. 354.

⁵ In this place only the general essential requisites of all legal transactions are considered. See *supra*, note 1.

⁶ See generally *W. H. Puchta*, *Handb. der freiwilligen Gerichtsbarkeit*, 2d ed. *Kriegen*, 1831, Part 1, § 69-65.

⁷ § 10. I. 2. 19 (20).

⁸ § 8. I. 2. 19 (20). See fr. 20. § 4. D. 28. 1; fr. 1. § 3. D. 41. 2; *Const.* 2. C. 4. 36; *Const.* 9. C. 6. 22; *Const.* 6. O. 6. 70. The temporary loss of reason of one highly intoxicated renders him incapable of concluding a legal transaction during such aberration. Intense rage only makes the exercise of will doubtful: fr. 48. D. 50. 17; fr. 3. D. 24. 2.

hence, persons who are still under paternal authority or under guardianship are restricted, in many respects, as to the undertaking of legal transactions.

2. *With respect to the Object.*¹

§ 175. With respect to the object of a legal transaction :

1. Its object cannot be of things which have ceased to exist, but may be of things which will come into existence or might come.² Further, things which are not the object of trade (*extra commercium*)³ and physically or morally impossible transactions (*contra bonos mores*)⁴ cannot form such object.

2. The object must not be too general or indefinite, and the giving or performing anything must not depend on the debtor's will solely.⁵

3. The transaction must not violate any legal prohibition.⁶

3. *With respect to the Determination and Declaration of the Will.*

§ 176. In every legal transaction the determination and declaration of the will of the parties to it is requisite. The declaration of will is either express, when it is effected by means which are only used to this object, namely, by oral or written words, or by signs which represent words;⁷ or it is tacit,⁸ which is when a person's actions admit of no other reasonable explanation than that he consented to the transaction.⁹ If a person does not consent to a transaction immediately at its outset, but only subsequently, it is termed ratification, and this generally has the same effect as previous consent.¹⁰

¹ See *Puchta, supra*, § 72-75.

² pr. §§ 1. 3. 19 (20); fr. 15. pr. D. 20. 1; fr. 11. § 3. D. 20. 4; fr. 8. pr. § 1. fr. 34. § 2. D. 18. 1; fr. 11. § 18. D. 19. 1; fr. 73. D. 45. 1; fr. 17. pr. D. 32; § 7. I. 2. 20.

³ § 2. I. 3. 19 (20); fr. 83. § 5. D. 45. 1; fr. 39. § 8-10. D. 30.

⁴ fr. 31. 185. D. 50. 17. "*Impossibilium nulla est obligatio*:" fr. 26. fr. 35. pr. § 1. fr. 141. § 4. D. 45. 1; fr. 112. § 3. D. 30; fr. 7. § 3. D. 2. 14; Const. 6. C. 2. 3.

⁵ fr. 8. D. 44. 7; fr. 17. fr. 46. § 3. fr. 105. § 1. fr. 108. § 1. fr. 115. pr. D. 45. 1; fr. 71. pr. D. 30; Const. 1. C. 5. 11. On the exceptions to this rule, see fr. 69. § 4. D. 23. 3; Const. 3. C. 5. 11; fr. 24. pr. D. 19. 2; *Glück, Comm. Vol. 4*, § 303.

⁶ Const. 5. C. 1. 14.

⁷ fr. 38. D. 44. 7. fr. 52. § 10. D. 44. 7.

⁸ *Härlin*, von der Stillschweigenden Einwilligung, Tübingen, 1814; *Kori*, über die Stillschweigende Willenserklärung, Naumburg, 1817; *Savigny, System, Vol. 3*, p. 242, *seq.*

⁹ fr. 5. D. 46. 8. fr. 20. pr. D. 29. 2; § 7. I. 2. 19; fr. 2. § 1. fr. 57, pr. D. 2. 14. The ordinary rule, "*qui tacet, consentit*," cannot serve as a general rule. Moreover, simple silence may signify neither dissent nor consent: fr. 142. D. 50. 17. "*Qui tacet, non utique fatetur; sed tamen verum est eum non negare*:" fr. 8. § 1. D. 3. 3; fr. 8. § 15. D. 20. 6. But also see fr. 4. pr. D. 9. 4; fr. 16. D. 14. 6; fr. 6. § 2. fr. 18. D. 17. 1; fr. 12. D. 21. 2; fr. 7. § 1. fr. 12. pr. D. 23. 1; fr. 2. § 2. D. 24. 3; fr. 63. D. 42. 1; Const. 5. C. 5. 4. From these passages is usually deduced the rule, "*qui tacet, ubi loqui debuisset consentire videtur*." See *Glück, Comment. Vol. 4*, p. 89, *seq.* But to the contrary is *Savigny, System, Vol. 3*, p. 248, *seq.*

¹⁰ fr. 12. § 4. D. 46. 3. "*Ratihabitio mandato comparatur*:" fr. 56. D. 5. 1; fr. 16.

4. *Restraints on the Exercise of Will.*

§ 177. The mere declaration of will of itself is not sufficient; the exercise of the will must be unrestrained and actually intended. Such exercise of will may be restrained by error, fraud, force and simulation.

a. *Error and Ignorance.*

§ 178. Error and ignorance, though different in their nature, are alike in respect to their legal consequences. A man errs when he believes that to be true which is false, and that to be false which is true. He is ignorant when he knows naught about it. If the error or ignorance is respecting the law, it is termed *error s. ignorantia juris*; if it be respecting a fact, it is *error s. ignorantia facti*.¹ On the effect of error and ignorance on legal transactions the following principles are to be observed:

I. If the circumstances necessary to a legal effect are wanting, such effect does not take place regardless whether the error be of law or fact. However there are cases in which he enjoys especial privileges who exercises *bona fide* a right which he erroneously presumed was his.²

II. In the ascertainment whether a legal effect attended by its usual circumstances does not take place because of error, is to be distinguished—

A. It does not take place when, according to the nature of the thing or according to an especial positive law, the lack of knowledge is connected with the circumstances. Thus,

1. The effect of a tacit declaration of will does not happen when the person who was to have declared it lacked that knowledge of the circumstances without which such declaration is not permissible.³

2. An agreement is void when there is an error which obstructs consent.⁴

3. The injurious consequences which arise when one exercises a right *malu fide* which he knows is not his naturally do not affect him who *bona fide* exercises a right which he erroneously presumes to be his. In such case it matters not whether it be an error of fact (*error facti*) or an error of law (*error juris*).⁵

§ 1. D. 20. 1; Const. 7. pr. C. 4. 28; Const. 25 in fin. C. 5/16; *Fritz*, Erläut. Vol. 1, p. 204.

¹ Dig. 22. 6; Cod. 1. 18; *Cujas*, Recitat. ad tit. Dig., in his works, Vol. 7, p. 928, seq.; *Donellus*, comm. jur. civ. lib. 1. c. 18-23; *Herrmann*, von den Wirkungen des Irrthums, Wetzlar, 1811; *Savigny*, System, Supplement 8, Vol. 3, p. 325, seq.

² In which is especially included the right of the *bonæ fidei possessor* to the fruits, the *usucapio*, the *Publiciana in rem* action and the extraordinary prescription. The error of law is here regarded the same as the error of fact, when it depends on a legal title, namely, in *usucapio* and the *Publiciana*.

³ fr. 19. 20. D. 39. 3; fr. 22. D. 29. 2; fr. 15. D. 2. 1; fr. 2. pr. D. 5. 1.

⁴ fr. 57. D. 44. 7; fr. 116. § 2. D. 50. 17.

⁵ In relation to one of the cases in division 3 this is expressly said in fr. 25. § 6. D. 5. 3.

B. Aside from cases of this kind the rule is that error does not hinder the legal operation of an event, nor¹ the unrestrained act of commission or the omission of him who errs.² Sometimes when one would be injured by the strict application of this rule, he is relieved by some special legal remedy. Such exceptions, which will be hereafter treated of, usually present excusable errors. But the error of law is only to be regarded as excusable when the erring had no opportunity to consult a jurist or could not follow the advice thus given to any certain result.³ On the other hand, error of fact is excusable⁴ excepting when it arises from gross inexcusable neglect and carelessness.⁵ But the proper error in fact is not in itself such an inexcusable error if not attended by aggravating circumstances.⁶ On the other hand, it is not necessary, in order to avert the injurious consequences of error, that a man should have proceeded with over-anxious care and circumspection.⁷ These general rules are subject to further exceptions in certain favored classes of persons, such as soldiers, females, wholly uneducated persons and minors. However, the first three named only enjoy this advantage, that their error of law in certain cases without especial cause is excused like the excusable error of fact,⁸ while this is not only the general rule as to minors,⁹ but their claim to *in integrum restitutio* against all the legal consequences of injurious acts or omissions¹⁰ extends far beyond.

b. *Fraud and Deception.*¹¹

§ 179. Fraud (*dolus*) in general is every intentional misrepresentation of the truth to induce another to perform an act which otherwise he would not have performed. In this wide sense the Roman law distinguishes between *dolus bonus* and *dolus malus*. The former is that which a man employs in self-defence against an unlawful attack, or for another permissible purpose, as,

¹ In legal operations which arise otherwise, this is of course; e. g., in legal pledges, in the action *de pauperie* and in the action *de effusis vel dejectis*.

² Thus the purchaser is bound for his completed purchase, even if the thing purchased is worth less than he thought, or if he thought that he required it when he did not.

³ See fr. 2. fr. 9. pr. § 3. D. 22. 6; fr. 10. D. 37. 1.

⁴ fr. 2. 4. 8. 9. pr. D. 22. 6.

⁵ fr. 3. § 1. fr. 6. fr. 9. § 2. D. 22. 6; fr. 5. § 1. D. 41. 10.

⁶ fr. 22. fr. 32. § 1. D. 12. 6.

⁷ fr. 6. D. 22. 6.

⁸ Respecting soldiers, fr. 9. § 1. D. 22. 6; Const. 1. C. 1. 18; Const. 22. pr. C. 6. 30; Const. 5. C. 9. 23. Respecting uneducated persons (*rusticitas*), fr. 2. § 1. D. 2. 5; fr. 1. § 5. D. 2. 13; fr. 2. § 7. D. 49. 14; fr. 3. § 22. D. 29. 5; Const. 8. C. 6. 9. Respecting females, fr. 8. 9. pr. D. 22. 6; Const. 3. 13. C. 1. 18; fr. 8. § 2. D. 2. 8; fr. 1. § 2-5. D. 2. 13; fr. 38. pr. §§ 2. 4. 7. D. 48. 5; fr. 15. § 5. D. 48. 10; fr. 1. § 10. D. 48. 16; fr. 2. § 7. D. 49. 14.

⁹ fr. 9. pr. D. 22. 6.

¹⁰ See the doctrine of the *in integrum restitutio*.

¹¹ Dig. 4. 3. and 44. 4; Cod. 2. 21; Paul, sent. rec. 1. 8.

e. g., when one dissembles the truth to prevent a lunatic injuring himself or others.¹ *Dolus malus* or *dolus* simply exists when one intentionally misleads another or takes advantage of another's error wrongfully, by that which is termed deception, fraud or cheating.² When fraud occurs in a legal transaction it may be contested, and according to the circumstances the damages caused by it may be claimed from the defrauder. He who alleges that another defrauded him must prove it.³

*c. Force and Fear.*⁴

§ 180. Force (*vis*) and fear (*metus*) are in general to each other like cause and effect. Force usually consists in the threat of an evil in order by the fear thus excited to induce a person to perform or to omit the performance of an act.⁵

Force has influence on legal transactions only when it is unlawful,⁶ and when the evil or the threat which produces fear is of such a nature as to impress a steady, sensible person.⁷ Such influence consists in that the effect of the injurious action may be contested in the same manner as in case of fraud, not only when he who forces or threatens strives to accomplish his purpose, but also when a third person attempts it.

d. Simulation.

§ 181. Simulation consists in a misrepresentation or concealment of the truth, and it takes place especially when one or both parties pretend to act differently from what they really do,⁸ whether it be done with a good, an indifferent or an evil intent, though in the latter case simulation partakes of the nature of fraud.⁹

B. NATURE OF LEGAL TRANSACTIONS.

§ 182. By the nature of a legal transaction is understood all which rightfully is a consequence and effect of such transaction as soon as it is essen-

¹ fr. 1. § 3. D. 4. 3.

² fr. 1. § 2. D. 4. 3: "Labeo sic definiit, dolum malum esse omnem callidatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est." See fr. 7. § 9. D. 2. 14; fr. 7. §§ 3. 8. fr. 8. fr. 9. § 2. fr. 37. D. 4. 3; fr. 6. § 9. fr. 11. § 5. D. 19. 1; fr. 35. § 8. fr. 57. § 3. D. 18. 1; fr. 16. § 1. D. 19. 5; fr. 2. §§ 3. 5. D. 44. 4; fr. 36. D. 45. 1; fr. 23. D. 50. 17.

³ In some cases *dolus* is presumed: *e. g.*, fr. 7. pr. D. 26. 7.

⁴ Dig. 4. 2. and 44. 4; Cod. 2. 20 and 7. 67; *Sarigny*, System, Vol. 3, § 114.

⁵ fr. 1. 2. D. 4. 2. In the Roman law *vis* means only physical force; *metus* denotes every other compulsion, especially moral.

⁶ fr. 3. § 1. fr. 23. § 2. D. 4. 2. Unlawful force is regarded as *dolus*: fr. 14. § 13. D. 4. 2; fr. 2. § 8. D. 47. 8.

⁷ fr. 5. 6. D. 4. 2. fr. 7. 9. D. 4. 2; Const. 9. C. 2. 20. He who consents to an act out of mere respect to another (*metus reverentialis*) is not considered as having acted under compulsion: fr. 1. § 6. D. 44. 5; Const. 6. C. 2. 20.

⁸ fr. 30. D. 23. 2; fr. 12. D. 39. 3; fr. 55. D. 18. 1; fr. 3. § 2. D. 44. 7; Const. 17. C. 4. 29; Cod. 4. 22.

⁹ fr. 7. § 9. D. 2. 14; fr. 49. pr. D. 19. 1. See § 391, *infra*.

tially completed, so that it is understood of itself without being specially agreed on. These natural characteristics of legal transactions, with their consequences and effects, are determined by law, and are presumed to exist till it is proven that they have been altered by agreement¹ (§ 173, *supra*).

C. COLLATERAL PROVISIONS OF LEGAL TRANSACTIONS.

§ 183. The incidental collateral provisions of a legal transaction are always founded on special agreement; hence they are never presumed, but must be always proved by him who invokes them.² Of the many kinds of these provisions only conditions, time and *modus* belong to this part of this work.

1. Conditions.³

§ 184. The validity and efficacy of a legal transaction may be made to depend on a condition, by which is understood in its wide sense every event on which legal relations depend, and in its narrow sense every event that is uncertain,⁴ future,⁵ and not belonging to the very nature of the transaction,⁶ but which has been annexed to it. The condition in a limited sense is—

1. Suspensive (*conditio suspensiva*) or dissolving (*conditio resolutive*),⁷ according as the beginning or end of a legal transaction is made to depend on it.

2. Either affirmative (*conditio affirmativa*) or negative (*conditio negativa*), according as that which is stipulated by it is made to depend on the commission or omission of an act.

3. Either power (*conditio potestativa*), or casual (*casualis*), or mixed (*mixta*), according as its performance depends on the power and will of him whose right depends thereon, or on casualty or on both together.

4. Either possible (*conditio possibilis*) or impossible (*conditio impossibilis*),⁸ according to the possibility or impossibility of performance.⁹ A kind of the

¹ See §§ 460, 461, *infra*; fr. 11. § ult. D. 19. 1; fr. 70. D. 17. 2; fr. 4. D. 13. 7.

² See, however, note 4, p. 149, *supra*.

³ Dig. 28. 7. and 35. 1; Cod. 6. 25. 45. 46; Ib. 8. 55; Savigny, System, Vol. 3, § 116–124, p. 121, *seq.*; Glück, Comm. Vol. 41, p. 45, *seq.*

⁴ On the *conditio necessaria*, see fr. 9. § 1. D. 46. 2; fr. 7. D. 45. 1; fr. 18. D. 12. 6.

⁵ On the condition as to the past and present, see § 4. I. 3. 15 (16). fr. 16. D. 28. 3; fr. 10. § 1. D. 28. 7; fr. 37. 39. D. 12. 1; fr. 100. 120. D. 45. 1.

⁶ On the condition which is implied in the nature of a transaction, and therefore need not be expressed, see fr. 21. fr. 41. § 1. fr. 68. D. 23. 3; fr. 3. D. 30; fr. 99. 107. D. 35. 1.

⁷ In the Roman law a transaction subject to a suspensive condition is termed *sub conditione* or simply *conditionale*. The dissolving condition is termed *conditio quæ resolvit*: fr. 2. pr. D. 18. 2; fr. 2. §§ 3. 4. 5. D. 41. 4; fr. 3. D. 18. 1.

⁸ Glück, Comm. Vol. 41, p. 111, *seq.*; Savigny, System, Vol. 3, p. 156, *seq.*

⁹ The performance may be absolutely or only under the especial circumstances impossible. On cases of the latter kind, see fr. 45. D. 28. 5; fr. 6. § 1. fr. 72. § 7. D. 35. 1; fr. 26. § 1. D. 40. 7.

impossible condition is the legally impossible, i. e., that whereby aught is made to depend on a transaction which is contrary to existing law or morals.¹ Impossible conditions are similar in effect to those whereby something unlawful or immoral is stipulated;² there are also stipulations which may not have an immoral or unlawful tendency, yet may be rejected as conditions of a transaction.³ These last two kinds are termed morally impossible, or immoral conditions. As long as it is uncertain whether a condition will take effect, it is termed pending (*conditio pendet*); when it has actually taken effect, it is termed existing (*conditio existit*); and when it is certain that it will not take effect it is termed deficient (*conditio deficit*).

2. Time (*Dies*).⁴

§ 185. A specification of time (*dies*) may be voluntarily annexed to a transaction.⁵ The *dies* is either a *dies a quo* or *ad quem* according as the commencement or the ending of a transaction depends on it.⁶ In each case it is either a *dies certus*, when it is certain that it will come and when, or a *dies incertus*, when both are or either is doubtful. In most cases a *dies certus* is regarded as a condition.⁷ In relation to the *dies a quo* two terms are to be noticed: *dies cedit*, which signifies that the day has arrived on which one acquires a right, and *dies venit*, which signifies that the day has arrived on which a creditor can sue his debtor for the object of his right.⁸

3. *Modus*.⁹

§ 186. There may be in a transaction a *modus*, which has various significations. Its primary meaning is the collateral condition annexed to a benev-

¹ fr. 35. § 1. fr. 137. § 6. D. 45. 1; fr. 72. § 7. D. 35. 1.

² fr. 9. 14. 15. 27. pr. D. 28. 7; fr. 123. D. 45. 1; § 36. I. 2. 20.

³ On the condition of an oath, see fr. 8. pr. §§ 6. 7. D. 28. 7; fr. 29. § 2. D. 29. 1; fr. 112. § 4. D. 30; fr. 14. § 1. D. 32; fr. 20. fr. 26. pr. fr. 97. D. 35. 1; *Savigny*, System, Vol. 3, p. 185, seq. On the condition if a divorce be had, see fr. 8. § 1. D. 7. 8; Const. 5. C. 6. 25; Const. 2. C. 8. 39. On the condition of not marrying, see fr. 72. § 5. fr. 79. § 4. fr. 100. fr. 62. § 2. fr. 63. pr. fr. 64. pr. D. 35. 1; Const. 2. 3. C. 6. 40; Novel 22. c. 43. 44. Of marriage, fr. 10. pr. fr. 15. fr. 63. § 1. fr. 28. pr. fr. 71. § 1. fr. 101. pr. D. 35. 1; fr. 23. D. 28. 7. On the condition of widowhood, see *Zimmern*, Rechtsg. Vol. 1, § 173. On the foregoing and other similar conditions, see *Savigny*, System, Vol. 3, § 123. The condition of change of religion and the condition of not changing religion were always considered invalid: arg. Const. 5. C. 6. 25; *Glück*, Comm. Vol. 41, p. 104, seq.; *Savigny*, System, Vol. 3, p. 184, seq.

⁴ *Savigny*, System, Vol. 3, § 125-127.

⁵ The legal terms and stipulations of time are treated of in § 195, *infra*.

⁶ The Romans distinguished the *dies a quo* by stipulation from the day or stipulation on the day; the *dies ad quem* by *stipulari ad diem*: fr. 44. § 1. D. 44. 7; § 2. I. 3. 15 (16); fr. 56. § 4. D. 45. 1.

⁷ fr. 75. D. 35. 1; fr. 56. fr. 16. § 1. D. 12. 6; fr. 45. § 3. D. 45. 1; fr. 4. pr. fr. 22. pr. D. 36. 2. See, however, Const. 3. 5. C. 6. 53.

⁸ fr. 213. pr. D. 50. 18. See § 767.

⁹ Cod. 6. 45. and 8. 55; Dig. 35. 1; *Savigny*, System, Vol. 3, §§ 128 and 129.

alent¹ transaction which is neither a legacy nor fideicommiss² whereby a donee shall appropriate in whole or in part to a certain object that which is given to him,³ or do something else.⁴ Such a *modus* does not make the transaction to which it is annexed dependent on the desired act or omission as if it were made a condition.⁵ On the other hand, when it has a binding direction it creates a legal obligation for the desired act or omission different from that which arises from a condition for it.⁶ The question by whom and in which way one can be compelled to observe a *modus* may be variously answered, according as it occurs in an institution of heir, will or other testamentary emancipation.⁷

IV. INVALID LEGAL TRANSACTIONS.

§ 187. If in a legal transaction any of the requisites to it be wanting, either with respect to the person or its external form or its essential contents, or if it conflict with a legal prohibition, the consequence is that the transaction is invalid (§ 172, *supra*).

1. According to the Roman law this invalidity occurs of itself (*negotium ipso jure nullum inutile*), even though it be not especially in conflict with the law.⁸ However, in some cases a transaction is treated as invalid when one of the parties by an exception or by plaint⁹ or by petition in *integrum restitutio* succeeds in causing the judge to declare it invalid (*negotium rescinditur*).

2. A valid and incontestable transaction is not invalidated by the arising of subsequent circumstances under which it would not have been entered into.¹⁰

3. The nature and validity of a transaction are determined immediately after the moment of completion;¹¹ and if a transaction were originally invalid

¹ See fr. 41. pr. D. 18. 1; fr. 58. § 2. D. 19. 2; *Schilling*, Instit. Vol. 2, § 83.

² Before fideicommissa became binding transactions, *modus* to some extent took their place: *Savigny*, System, *supra*, p. 228; and also to some extent subsequently till such a *modus* was by C. 2 C. 6. 5. given the full effect of a fideicommiss: *Savigny*, *supra*, pp. 236 and 237.

³ fr. 17. § 4. D. 35. 1.

⁴ fr. 92. D. 35. 1; fr. 17. § 2. D. 40. 4.

⁵ fr. 80. D. 35. 1; fr. 17. § 2. D. 35. 1.

⁶ C. 9. C. 8. 54. On the difference between condition and *modus* see *Savigny*, *supra*, p. 281. In the sources the term *conditio* is sometimes used for *modus*, but with "ut" or something similar. See fr. 8. D. 28. 7; fr. 71. § 1; fr. 80. D. 35. 1; fr. 44. D. 40. 4; fr. 2. § 7. D. 39. 5; Const. 1. 2. 5. C. 8. 55.

⁷ *Savigny*, *supra*, § 129.

⁸ Const. 5. pr. C. 1. 14; *Weber*, von der nat. Verb. § 74.

⁹ *E. g.*, by the *exceptio deli mali*, by the *exceptio quod metus causa*, § 1-5. I. 4. 13, or by the *querela inofficiosi testamenti*.

¹⁰ It is not a general rule that a transaction becomes invalid if circumstances subsequently arise under which such transaction could not have been entered into. See fr. 3. § 2. D. 34. 8; fr. 98. pr. fr. 140. § 2. D. 45. 1; fr. 85. § 1. D. 50. 17.

¹¹ fr. §. pr. D. 17. 1; fr. 78. pr. D. 45. 1.

it does not in general subsequently become valid simply because the causes of invalidity have ceased.¹

4. By the partial invalidity of a transaction so much of it as is valid and may exist by itself does not suffer detriment.²

5. A transaction invalid in itself may be sustained through conversion, i. e., by changing it into another transaction. Such conversion always presumes that the requisites to the converted transaction be not lacking. The parties to it must generally expressly agree to it.³

V. INTERPRETATION OF LEGAL TRANSACTIONS.

§ 188. The interpretation of legal transactions is either authentic⁴ or doctrinal according as it proceeds from the parties themselves or is founded on the rules of juridical hermeneutics.

1. In authentic interpretations a distinction is made when the transaction is unilateral, as in the case of a testament, or when there are several parties, as in the case of an agreement. In the former the doubtful passages must be construed in the sense that the testator desired them to be understood.⁵ In the latter the authentic interpretation requires the concurrence of all the parties, and the interpretation of one of them cannot injure the rights of the others.

2. In doctrinal interpretations the following rules are to be observed: Every obscure and doubtful passage must be construed according to the real intention of the parties, which we should endeavor to ascertain from the words, the usage of language, the circumstances and relations of the parties.⁶ The words are to be understood according to the especial usage of language of the parties to the transaction, and when this cannot be discovered then according to the usage of language of the place.⁷ If the real intention cannot be ascertained with certainty, then the obscurity must be so explained as will best satisfy the nature of the transaction;⁸ and if this rule be unavailing, then a convention capable of conflicting interpretations is to be construed

¹ fr. 29. D. 50. 17. "*Quod initio vitiosum est, non potest tractu temporis convalescere*:" Ex. 201. fr. 210. D. 50. 17; fr. 1. D. 34. 7.

² fr. 1. § 5. D. 45. 1. "*Utile per inutile non vitiatur*," e. g., fr. 29. D. 22. 1; fr. 21. § 1. D. 13. 5; Const. 36. § 3. C. 8. 54.

³ E. g., in the *clausula codicillaris*: fr. 1. D. 29. 7; Const. 8. § 1. C. 6. 36. See, *infra*, § 758. But also see fr. 8. 19. pr. D. 46. 4.

⁴ On the usual interpretation, see note 7, *infra*.

⁵ fr. 96. D. 50. 17; fr. 21. § 1. D. 28. 1.

⁶ fr. 219. D. 50. 16; fr. 67. D. 50. 17; e. g., fr. 3. § ult. D. 33. 10; fr. 33. D. 34. 2; fr. 22. D. 34. 1; fr. 14. D. 33. 1; fr. 75. D. 32.

⁷ fr. 65. § 7; fr. 69. § 1. D. 32; fr. 9-12. D. 33. 6; fr. 18. § 3. D. 33. 7; fr. 7. § 2. D. 33. 10; fr. 34. D. 50. 17. Mackeldey terms this a *usual* interpretation of a legal transaction, and presents it as a third kind co-ordinate with authentic and doctrinal interpretation.

⁸ *Interpretatio faciendi est secundum naturam negotii*: fr. 3. D. 12. 1; fr. 11. § 1. 2. D. 19. 1; fr. 72. pr. D. 18. 1.

against the party who should have clearly defined it.¹ If there be doubt as to the extent of the promise, the construction must be for the least.² If from the words used by the parties it is wholly uncertain and doubtful what was intended, the transaction is invalid.³ However, a transaction should, if possible, be interpreted in favor of its validity rather than its invalidity.⁴

¹ *Interpretatio faciendi est contra eum, qui clarius loqui potuisset ac debuisset*: fr. 172. pr. D. 50. 17; fr. 39. D. 2. 14; fr. 21. D. 18. 1; fr. 38. § 18. D. 45. 1; fr. 26. D. 34. 5.

² *In dubio id, quod minimum est, sequimur*: fr. 9. 34. D. 50. 17; fr. 52. D. 19. 2; fr. 1. § 4. D. 45. 1.

³ fr. 188. D. 50. 17; fr. 2. fr. 10. pr.; fr. 21. 27. 28. D. 34. 5.

⁴ fr. 12. D. 34. 5; fr. 80. D. 45. 1.

FIFTH DIVISION.
OF RIGHTS AND REMEDIES.

CHAPTER FIRST.

OF RIGHTS PER SE.

I. NATURE AND DIFFERENCES OF RIGHTS.

§ 189. Right in its subjective sense is the power or authority of a person either to act for himself or to require another to act or omit to act for the former's advantage (§ 2, *supra*). Every right in this sense assumes the existence of a subject and an object (§ 14, *supra*). According to its object and extent it is divided into the following four kinds, namely, right of status, family rights, real rights and claims (§ 15, *supra*).

II. GENERAL RULES ON THE EXERCISE OF RIGHTS.

§ 190. He who is entitled to a right not limited by the opposing right of another may—

1. Exercise such right within its bounds fully and according to his own volition, even if another person should be damaged by such exercise.¹

2. Generally he may exercise such right himself, or may permit another to exercise it.²

3. When a right is conceded to a person, he also acquires everything necessary for its enjoyment.³

4. He who is empowered for the greater may perform the lesser contained in it.⁴

5. He who has all the advantages of a thing must also bear its burdens.⁵

6. He who has authority over a thing has generally the power of alienating it, i. e., either wholly to relinquish it, or to transfer it to another in whole or in part. To this latter division there are, however, numerous exceptions and limitations.⁶

III. ACQUISITION OF RIGHTS.

§ 191. For the acquisition of rights there is requisite—

1. A person capable of them, a thing or transaction which can be the object of them, and a rightful mode of acquisition. The latter rests mediately

¹ fr. 55. 151. 155. § 1. D. 50. 17. "Qui jure suo utitur neminem lædit," *e. g.*, fr. 24. § 12. fr. 26. D. 39. 2. See, however, the doctrine of the limitations of property in real estate, and fr. 1. § 12. D. 39. 3; fr. 38. in fin. D. 6. 1; Novel 63.

² *E. g.*, fr. 12. § 2. D. 7. 1.

³ *E. g.*, fr. 20. § 1. D. 8. 2; fr. 10. D. 8. 1; fr. 3. § 3. D. 8. 3.

⁴ fr. 21. 113. D. 50. 17. *E. g.*, pr. I. 2. 3.

⁵ fr. 10. D. 50. 17. See Const. un. § 4. C. 6. 51.

⁶ pr. § 2. I. 2. 8; Const. 2. C. 2. 14. See § 193, *infra*. All strictly personal rights cannot be transferred. See §§ 199, 308 and 366, *infra*.

or immediately on law, or on a legal transaction whereby one concedes a right to another. The acquisition is founded on succession, when by entering into the right of another a person acquires only that right to the extent that the other possessed it.¹ When one thus succeeds to a single right of property of another, it is termed a *successio in rem, in singulas res*—a several succession; but if one succeeds at one time, by one event, to an entire property (estate), including all the appertaining debts (*in omne jus, in universum jus, in universa bona, e. g., defuncti*), it is termed a *successio per universitatem*, a universal succession.²

2. Generally one can acquire a right either by himself or through another, especially through such persons as are in his power.⁴

3. A right completely acquired is termed *jus præsens*. Every right which is expected to be acquired, but not completely acquired, is termed *jus futurum*, and this is either *jus delatum*, when the acquisition depends only on the will of the acquirer,⁵ or *jus nondum delatum*, when it depends on other circum-

¹ fr. 54. D. 50. 17. "*Nemo plus juris in alterum transferre potest, quam ipse habet.*" He who is succeeded to is termed *auctor*, fr. 175. § 1. D. 50. 17, especially when succeeded to in *singulam rem*. Acquisition in consequence of succession is termed derivative; every other mode of acquiring rights is termed original. Derivative is subdivided into translative and constitutive.

² This mode of succession of rights, *e. g.*, of property, is termed acquisition *per universitatem*, in contradistinction from acquisition *singularum rerum*. Gaius, III. § 82-84; § 6. I. 2. 9; § 1. I. 3. 10.

³ fr. 7 in f. fr. 8. D. 12. 2; fr. 3. § 1. D. 21. 3; fr. 1. § 13. D. 43. 3; fr. 24. 208. D. 50. 16. On the nature of universal succession, see *Savigny, System*, Vol. 3, § 105.

⁴ The Roman law prescribes—

1. That the *paterfamilias* may acquire absolutely rights of property through those who are in his power (*jus*); this rule is in force in the Justinian law, but with the modification that the *filiusfamilias* may also acquire for himself.

2. Possession may be directly acquired, and rights which are acquired by possession may be acquired through *extraneæ personæ*, that is, through such persons as are not in one's power (*jus*). Rights of property may generally be acquired indirectly through them, that is, the *extraneæ personæ* by their acts acquire these for themselves, but are bound to transfer to those whom they represent as guardians, agents, etc., that which they have so acquired. This is especially the case in transactions in which claims are acquired. But not in all transactions by which rights of property are acquired is representation permitted in this manner, *e. g.*, not in the entering into an inheritance. There are cases, however, in which direct acquisitions through transactions of voluntary representatives are permitted. Gaius, II. 86-96; III. 163-167; Ulpian, XIX. 18-21; Inst. 2. 9. 3. 17. (18.); 3. 28. (29.); fr. 10. 13. 17. 18. 19. fr. 20. § 2. fr. 21. 23. 53. D. 41. 1; fr. 11. D. 44. 7; fr. 123. pr. D. 50. 17; Cod. 4. 27. At the present day one can acquire in general directly through *extraneæ personæ*, in those cases in which by the Roman law only an indirect acquisition was permitted through them, if the transaction were for the purpose of acquisition and the *extraneæ personæ* were properly authorized thereto.

⁵ fr. 161. D. 50. 16. "*Delata hereditas intelligitur, quam quis adeando possit consequi.*"

stances and conditions, which if not happening the acquisition of the right would be impossible.

IV. MAINTENANCE OF RIGHTS.

§ 192. To the means whose object is the maintenance and security of rights belong—

1. Protestation, *i. e.*, a declaration by which one protects himself against the detrimental consequences which might arise from a transaction.

2. Reservation, which is an express withholding of certain rights, the surrender of which would otherwise follow or might be inferred from one's action.

3. Retention, or the right of retaining a thing due to another which one possesses till that other satisfies a claim connected with it.¹ This right can be exercised only so long as one possesses the thing, and the mode of enforcing it is by the plea of fraud (*exceptio doli*) against the plaintiff's action for the surrender of the thing.²

4. Caution, which is that security which one gives to another for the performance of an obligation.³ It is either a verbal caution⁴ or a real caution, to which latter belong the security by guaranty (*satisfactio*)⁵ and by pledge.⁶

5. The *missio in possessionem*, which is the transfer by the prætor of another's entire property (*in bona*), or of single objects belonging to him (*in rem*), for the purpose of securing certain rights to the transferee.⁷ In this case the transferee only received the detention of the thing, together with the right and duty of *custodia*, *i. e.*, of keeping and administering the same,⁸ and a lien;⁹ and only in the case of a transfer for the damages threatened (*missio damni infecti causa*), when granted by the prætor's second decree, he acquired the ownership of the thing, provided it was the debtor's property.¹⁰

¹ *Fasellius*, vom Retentionsrechte, 2d ed. 1793; *Glück*, Comm. Vol. 15, §§ 936. 937; *Schönck*, die Lehre von dem Retentionsrechte, Jena, 1837; *Luden*, das Retentionsrecht, Leipzig, 1839; *Groskopf*, zur Lehre vom Retentionsrecht, Oldenburg, 1858.

² *E. g.*, § 30. I. 2. 1; fr. 23. § 4. fr. 27. § 5. fr. 48. D. 6. 1; fr. 14. D. 44. 4; fr. 18. § 4. D. 13. 6; fr. 1. pr. D. 20. 6; fr. 14. § 1. D. 10. 3; fr. 8. pr. D. 13. 7; Const. 29. C. 5. 12; Const. un. C. 8. 27.

³ Inst. 4. 11; Dig. 2. 8. Dig. 46. 5-8; Cod. 2. 57.

⁴ The simple *repromissio* is one kind of it, and the oath (*cautio juratoria*) is another kind.

⁵ Const. 3. C. 6. 38; fr. 1. D. 2. 8.

⁶ fr. 1. § 9. D. 37. 6. See Inst. 3. 20. (21).

⁷ Dig. 36. 4; 37. 9. 10; 39. 2; 42. 4. 5; 43. 4; Cod. 6. 54; 7. 72; *Donellus*, comm. jur. civ. Lib. 23. cap. 11. 12; *Bachofen*, das Röm. Pfandrecht, Vol. 1, Basel, 1847, p. 781-480.

⁸ fr. 1. 12. D. 42. 4; fr. 5. § 5. D. 36. 4; fr. 3. § ult. fr. 10. § 1. D. 41. 2; *Savigny*, Recht des Besitzes, 6th ed. p. 324.

⁹ fr. 3. pr. § 1. D. 27. 9; fr. 26. pr. D. 13. 7; Cod. 8. 22. For the several cases of these transfers, see § 342, *infra*.

¹⁰ Such granting of property by the second decree occurs only in the case of

V. ENDING OF RIGHTS.

A. WITH THE CONSENT OF THE PARTY ENTITLED.

§ 193. Rights once acquired continue to exist till some special cause arises to end them. Such cause may depend on the will of the party entitled, or may be contrary to such will. Under the former rights are extinguished—

1. By renunciation, which consists in one's resigning a right which belongs to him without transferring it to another:¹ to which is requisite that the right is his,² and that he has a full knowledge of the object of the renunciation.³

2. By alienation, which in its wide sense means every change which we undertake in our legal relations;⁴ hence not only the transfer of a right to another, but also the renunciation of a right, the grant of a servitude or a pledge and the acceptance of payment. In its narrow sense it denotes the transfer or granting of a right,⁵ and in its narrowest sense the alienation of a thing or the transfer of the ownership of it to another.⁶ Generally every one who actually owns a thing is capable of such alienation, if he be not for some cause prohibited. Such prohibition of alienation may be founded on a legal or judicial prescript or on a testamentary disposition or a convention.⁷

B. AGAINST THE WILL OF THE PARTY ENTITLED.

§ 194. Rights may end contrary to the will of the party entitled, from many causes; thus:

1. Rights dependent on a status cease with the status.

2. Real rights are extinguished when their object perishes, as also when the grantor at the time of the grant had only a temporary or revocable right to the object of the right, which right ceased.⁸

3. Claims are extinguished when cancelled, or when the party entitled has lost all interest in their fulfillment.⁹

4. Many rights are extinguished through a resolute condition or by the expiration of the term for their existence.¹⁰

threatened damages (*damnum infectum*), when the *missio ex primo decreto* was ineffectual, i. e., when the security demanded for threatened damages (*cautio damni infecti*) was not given within the legal time.

¹ fr. 41. D. 4. 4; Const. 29. C. 2. 3. "Quilibet juri pro se introducto renunciare potest;" Const. 11. C. 4. 1; Const. 4. C. 2. 3; Const. 51. C. 1. 3.

² fr. 174. § 1. D. 50. 17.

³ fr. 19. D. 5. 2; fr. 8. D. 5. 3.

⁴ fr. 28. pr. D. 50. 16.

⁵ Const. 7. C. 4. 51. Here the rule is applicable, *nemo plus juris in alterum transferre potest, quam ipse habet*; fr. 54. D. 50. 17.

⁶ fr. 67. pr. D. 50. 16; Const. 1. C. 5. 23.

⁷ See the doctrine of property, *infra*.

⁸ See § 267, *infra*.

⁹ fr. 8. § 6. D. 17. 1; fr. 136. § 1. D. 45. 1.

¹⁰ *E. g.*, fr. 4. pr. D. 8. 1; fr. 4. D. 7. 1; fr. 6. pr. D. 20. 6; fr. 44. §§ 1. 2. D. 44. 7.

5. And as a penalty for an offence.¹
6. And by the death of the party entitled.²
7. And by prescription.

VI. THE RELATION OF TIME TO RIGHTS.³

§ 195. In the acquisition and loss of rights a certain prescribed time (*tempus*) often becomes important. In the computation of time the Roman law distinguishes—

1. Continuous (*continuum*) and juridical time (*utile tempus*).⁴ By a prescribed term of time is generally meant an unbroken succession of divisions of time, which is called continuous time.⁵ It is only in many shorter periods of time, not longer than a year, within which certain acts must be performed, otherwise the right thereto will be lost, that the especial rule governs, that in such acts only the juridical days (*dies utiles*) are computed.⁶ The days are not computed when he who was to have undertaken an act was personally hindered in it; but this rule is not always applicable to the day on which an act occurred of which he was ignorant.⁷ A term does not become *utile tempus*, i. e., measured by the juridical days, because it is prescribed that it shall only begin to run against him who is affected by it after his knowledge thereof.⁸

2. By the computation of time by moments (*ad momenta* or *a momento in momentum tempus computare*) and civil computation (*civiliter tempus computare*), or the enumeration of days (*ad dies numerare*).⁹ In the former mode of computation, the *computatio naturalis*, which appears in the Roman law only as an exception,¹⁰ the time is to be computed according to the moment. On the contrary, in the latter, which forms the rule, regard is had to the calendar day on which the event occurs with which the computation of time commences. This calendar day in the *civiliter computare* is wholly included in the time to be computed; so that in the subsequent year in which it expires the day preceding the corresponding calendar day is regarded as the last (*novissimus, postremus s. extremus dies*).¹¹ If the case be concerning the loss

¹ *E. g.*, Const. 3. C. 11. 42; cap. 24. X. 5. 33.

² Namely, status, family rights and some property rights, which are termed strictly personal, *e. g.*, usufruct.

³ A Byzantine monograph is mentioned in note 1, p. 66, *supra*.

⁴ *Savigny*, System, Vol. 4, § 189-191.

⁵ *fr.* 31. § 1. D. 41. 3; Const. 8. C. 2. 21; Const. 7. C. 2. 53.

⁶ *fr.* 1. D. 44. 3; *fr.* 2. D. 38. 15.

⁷ See *fr.* 6. D. 3. 6; *fr.* 19. § 6. *fr.* 55. D. 21. 1; *fr.* 2. *pr.* D. 38. 15; Const. 8. C. 2. 21; Const. 2. C. 4. 58.

⁸ § 16. I. 1. 25; *fr.* 1. § 15. D. 49. 4; Const. 19. 22. § 2. C. 6. 30.

⁹ On this disputed doctrine, see *Glück*, Comm. Vol. 3, § 269; *Unterholzner*, Verjährungslehre, Vol. 1, p. 296, *seq.*, p. 302, *seq.*; *Savigny*, System, Vol. 4, § 182-188.

¹⁰ *fr.* 3. § 3. D. 4. 4.

¹¹ Thus a person born on January 1, 1863, completes his fourteenth year after midnight of December 30, 1876. See *fr.* 5. D. 28. 1; *fr.* 1. D. 40. 1; *fr.* 6. 7. D. 41. 3; *fr.* 15. *pr.* D. 44. 3; *fr.* 134. D. 50. 16.

of a right by the neglect of a term, then such term includes the entire last day.¹ But if the case be concerning the acquisition of a right or of capability by the efflux of time, then it is sufficient if only the first moment of the time be reached (*dies cæptus pro completo habetur*).²

VII. OF PARTICULAR RIGHTS (*jura singularia*) AND PRIVILEGES.

A. JUS COMMUNE AND SINGULARE.

§ 196. Positive laws either contain general principles embodied in the rules of law (*regula juris s. ratio juris*) or for especial reasons they establish something that differs from those general principles. In the first case they contain a common law (*jus commune*), in the second a special law (*jus singulare s. exorbitans*).³ The latter is either favorable or unfavorable (*jus singulare favorabile* or *odiosum*) according as it enlarges or restricts, in opposition to the common rule, the rights of those for whom it is established. The favorable special law (*jus singulare*), as also the right created by it in a subjective sense, in the Roman law is termed benefit of the law (*beneficium juris*) or privilege (*privilegium*), and this is either a *beneficium personæ* when restricted to the person on whom it is conferred and not also for the benefit of his heirs and sureties,⁴ or a *beneficium causæ* when it has such a legal relation that it may be enjoyed not only by the immediate and original party entitled to it, but also by his heirs, sureties and alienees.⁵ Both of these, however, are only considered when persons on whom they are conferred desire to enjoy them.⁶

B. PRIVILEGES.

§ 197. Privilege in its wide sense denotes every advantage or favor granted by law in derogation of the common law.⁷ Such privilege may be either conferred by a general law on all persons who are capable of it, in which case it is synonymous with *beneficium juris* or *jus singulare favorabile*,⁸ or it may be specially conferred by the government on a certain designated person or thing, in which case it is a privilege in its narrow sense.⁹ But as *benefic-*

¹ fr. 1. § 9. D. 38. 9; fr. 6. D. 44. 7; fr. 30. § 1. D. 48. 5.

² See the citations in note 11, p. 163, which at most only speak of three cases.

³ fr. 14-16. D. 1. 3; fr. 141. pr. D. 50. 17.

⁴ fr. 68. 196. D. 50. 17; *e. g.*, fr. 24. 25. D. 42. 1; fr. 7. pr. D. 44. 1; Const. 13. C. 10. 47; *Mühlenbruch*, von der Cession, § 56.

⁵ fr. 68. 196. D. 50. 17; fr. 7. § 1; fr. 19. D. 44. 1; *e. g.*, fr. 6. D. 4. 1; fr. 18. § 5; fr. 24. pr. D. 4. 4; fr. 14. § 2. D. 4. 2; Const. un. C. 2. 34.

⁶ fr. 69. D. 50. 17; fr. 156. D. 50. 17.

⁷ Namely, privilege in its subjective sense. The term privilege in its objective sense also comprehends disadvantageous derogations from the common law. Privileges in their objective sense are usually divided into unfavorable and favorable.

⁸ In this sense we speak of privileged pledges, of privileges of the Fiscus, minors, soldiers and women; of privileges of the *dos*, etc.: fr. 40. 42. 44. § 1. D. 26. 7; fr. 74. D. 23. 3; Cod. 7. 73. 74; Const. 12. C. 8. 18; Novel 97. C. 2. 3; Novel 109. C. 1.

⁹ See fr. 1. §§ 1. 2. D. 1. 4; § 6. I. 1. 2.

iura juris is often termed *privilegium* in the Roman law,¹ so, on the contrary, *privilegium* in its narrow sense is sometimes termed *beneficium*.²

C. DIVISION OF PRIVILEGES.

§ 198. Privilege in its narrow sense is—

1. With respect to the subject to whom or which it belongs, either a personal privilege (*privilegium personæ*), as when it is conferred on a physical or legal person, or a privilege real (*privilegium rei s. prædii*), as when it is conferred on a certain piece of land so as to become part of it.³

2. With respect to its object, a privilege is either an especial advantage conferred on the privileged person over others (*privilegium affirmativum*)⁴ or in exempting him from a duty incumbent on others (*immunitas, vacatio*, now termed *privilegium negativum*).

3. With respect to the motive for conferring it, it is either a gratuitous privilege (*privilegium gratuitum*), when the granting of it rests solely on the favor and liberality of the ruler, or a burdensome privilege (*privilegium onerosum*), when the privileged party pays or performs something for it.⁵

D. LEGAL NATURE OF PRIVILEGES.

§ 199. The legal nature and operation of a privilege is always in the first place to be determined from the privilege itself. The general rules are:

1. The privileged person may exercise it to its full extent and cannot be hindered in it;⁶ but it does not follow that he has the right to prohibit every other person from exercising it who has not the same privilege.

2. A privilege granted to a physical person can only be exercised by the party to whom it is given.⁷ One conferred on a corporation may according to its nature be exercised by every member of it (*e. g.*, exemption from taxes), or only in the name of the corporation by its proper officers (*e. g.*, jurisdiction). A privilege appurtenant to land may be exercised by every possessor of the land.⁸

3. A privilege cannot be separated from the land to which it is appurtenant nor from the person on whom it is conferred and transferred to another. In general a privileged person may permit another to exercise his privilege, either gratuitously or for a compensation, if it be not inconsistent with the nature and character of the privilege. The exercise of negative privileges cannot be delegated, though of affirmative privileges it sometimes may, even if the exercise be limited to the privileged person.

¹ fr. 196. D. 50. 17. and the citations above in note 8, p. 164.

² *E. g.*, fr. 3. D. 1. 4.

³ fr. 1. § 41–43. D. 43. 20. There may also be *privilegia causæ*, which do not belong to *jura singularia* (§ 196, note 5, *supra*), but to privileges in their narrow sense.

⁴ An especial kind of these are monopolies, by virtue of which one is entitled to do alone and exclusively what otherwise might also be done by others.

⁵ They are divided into *privilegia gratiosa* and *conventionalia*.

⁶ fr. 3. D. 1. 4; Const. 2. C. 1. 14.

⁷ fr. 1. § 43. D. 43. 20; fr. 1. § 2. D. 1. 4.

⁸ fr. 1. § 43. D. 43. 20.

E. END OF PRIVILEGES.

§ 200. A privilege becomes extinct—

1. According to its nature by the efflux of time,¹ or, when granted without limitation as to time, by the death of the physical² person or by the cessation of the legal person to whom the personal privilege³ or the privileged thing, if it be a *privilegium rei*, was given.⁴

2. When the government revokes the privilege, which generally can be done only when the public weal requires the revocation, and then the privileged party must be compensated for the loss of his right. It is not an exception to this rule when the right of recall was reserved.⁵

3. When the privileged person abuses it and consequences ensue which are especially injurious to the state, he may be deprived of it.⁶

4. When the privileged person either expressly or tacitly renounces it.⁷

5. A privilege for holding fairs (*privilegium mundinarum*) ceases by non-user for ten years.⁸

VIII. CONCURRENCE AND COLLISION OF RIGHTS.⁹

§ 201. A concurrence of rights takes place when the rights of different persons apply to the same object or person, and each person can exercise his right fully. A collision of rights, on the contrary, occurs when the rights of several persons so collide that they cannot be fully exercised together; in which case the question depends on—

1. Whether one right shall not take precedence of another: such precedence may arise from express law,¹⁰ and frequently arises from general principles.¹¹

2. If neither of the colliding rights take precedence over the other, then the following distinctions are to be observed:

α. He is preferred who is first in time, because he in a legal manner put himself in the position required by his rights.¹²

¹ Const. 2. C. 1. 23.

² fr. 1. § 43. D. 43. 20; Const. 13. C. 10. 47.

³ fr. 4. § 3. D. 50. 15.

⁴ If the thing be restored, the privilege is revived: arg. fr. 20. § 2. D. 8. 2.

⁵ arg. Const. 7. C. 1. 19. It matters not whether the privilege be gratuitous or onerous (§ 199, *supra*). Glück, Comm. Vol. 2, §§ 107. 108.

⁶ Const. 3. C. 11. 43; cap. 43. X. 1. 3.

⁷ fr. 41. D. 4. 4; Const. 29. C. 2. 3.

⁸ fr. 1. D. 50. 11. See Const. 2. C. 10. 43.

⁹ Stahl, über die Collision und den Vorzug im Rechte, Würzburg, 1826; Böcking, Instit. Vol. 1, p. 551-556; Wächter, Handbuch, Vol. 2, p. 587-601.

¹⁰ E. g., fr. 3. § 2. D. 14. 6; fr. 11. § 7. fr. 12. pr. D. 4. 4. Here belong the privileges of certain rights of pawn, and the rules on the order of priority of privileged pawn rights between themselves, and the marshalling of certain claims in bankruptcy.

¹¹ Wächter, p. 589-596.

¹² fr. 32. D. 3. 3; fr. 11. § 6. fr. 34. pr. D. 4. 4; fr. 13. D. 5. 1; fr. 9. § 4. D. 6. 2; fr. 10. pr. D. 20. 1. and fr. 126. § 2. fr. 128. pr. D. 50. 17. "In pari causa possessor potior haberi debet."

b. If no creditor is in possession or has a lien, then each of the persons entitled must yield a diminution of right to the other persons entitled, and must divide the object of their rights,¹ and when this cannot be done, it must be determined by lot.²

CHAPTER SECOND.

LEGAL PROSECUTION OF RIGHTS.

I. ROMAN CIVIL PROCEDURE.

1. GENERAL VIEW.

§ 202. If one desires to prosecute an alleged right which he claims against another, which right the latter does not admit, he generally must enforce it legally, *i. e.*, invoke the judiciary to determine and perfect it by their judgment. The rules to be observed respecting the procedure before the judicial power and by its officers were not always the same. Before the time of Diocletian,³ a proper lawsuit, *i. e.*, a transaction respecting an alleged claim requiring a decision, was not generally determined by the authority having jurisdiction, but was only initiated by it, and then continued and determined by particular judges. In the most ancient time the initiation was *per legis actionem*,⁴ *i. e.*, by the oral recitation of certain forms annexed to the laws, sometimes in connection with symbolical acts, whereby the suit was placed in proper form; but since the *lex Æbutia* and two *leges Julæ judiciaræ*, the initiation was only sometimes *per legis actionem*,⁵ but generally *per formulam*,⁶ that is, without such formally prepared written instructions as the government gave to the judges. The proper judicial office (*officium judicis*, in contradistinction from *officium jus dicentis*) in most cases originally belonged to a permanent body.⁷ But anciently, as exceptions, and even previous to the *lex Æbutia*, more frequently the judges (in many cases one judge sufficed) were especially appointed for each suit,⁸ and in the proceedings *per formulam*, the judiciary were always named in the beginning of the formula, which here generally consisted of a *judex* and exceptionally of several *recuperatores*.⁹ At an early period, but especially under the emperors, there were exceptional

¹ *E. g.*, Const. 6. in f. C. 7. 72.

² *E. g.*, fr. 13. 14. D. 5. 1; fr. 5. D. 10. 2; fr. 24. § 17. D. 40. 7; Const. 3. pr. C. 6. 41. § 23. I. 2. 20.

³ See *Zimmern*, *Gesch. des R. Privatrechts*, Vol. 3; *Puchta*, *Instit.* Vol. 2, § 149–188.

⁴ The leading source of the old Roman civil procedure is Gaius, *Instit. comment.* IV., *Stahl*, *über das alt. R. Klagenrecht*, Munich, 1827; *Dupont*, *Disquis. in comm.* IV. *Instit. Gaii*, Leyden, 1822.

⁵ Gaius, IV. § 11, *seq.*

⁶ Gaius, IV. § 31.

⁷ Gaius, IV. § 30, *seq.*

⁸ In the most ancient period the *pontifices*, at a later period the *decemviri litibus judicandis* and the *centumviri*.

⁹ See § 203, *infra*.

¹⁰ Gaius, IV. § 30. *seq.* See § 204, *infra*.

cases in which a higher officer departed from the *ordo judiciorum* and himself decided (*prætor vel præses extra ordinem cognoscit, extraordinaria cognitio*).¹ An important alteration in the ancient mode of procedure took place also in the appeal, in the modern sense of the word, introduced under Augustus. Formerly the first final judgment declared was also the last,² and when an appeal was had, such appeal was from the decision of an officer in Rome, and consisted in a petition to another officer of equal or higher authority, or to a tribune, to intercede.³ But since the time of Augustus appeals in another sense were permitted,⁴ namely, those in which the dissatisfied party prayed a higher judge, sometimes another officer and sometimes the emperor himself or one who represented him in this relation, to test the judgment and to amend it in accordance with justice. Under Diocletian and his successors it was the general rule in the first instance that the same person who initiated the suit conducted and determined it.⁵

2. LEGIS ACTIONES.⁶

§ 203. Not all kinds of civil suits were instituted by one and the same *legis actio*. In the course of time there arose at least four different *legis actiones*, of which sometimes one and sometimes another was applicable; viz., the *legis actio sacramento*, the *per judicis postulationem*, the *per condictionem*, and the *per manus injectionem*, in addition to which some of the Roman jurists introduced a fifth, the *pignoris capio*.⁷ In all cases for which another *legis actio* did not exist the *sacramento agere* was resorted to.⁸ The term *sacramentum* here denotes a sum of money—sometimes consisting of five hundred asses (*sacramentum majus*) and at other times of only fifty (*sacramentum minus*)—which the losing party should pay to the public treasury.⁹ In the most ancient times each party on the institution of suit had to deposit this sum *in sacro*, not to be returned to the party who did not gain his suit.¹⁰ At a later period each party, in the event that he might be unsuccessful, had to give as security persons possessing immovable property (*prædes*).¹¹ The formal reciprocal demands for the securing of the *sacramentum*¹² by the designation of the condition on which it shall depend, whether the one or the

¹ Dig. 50. 13. See § 205, *infra*.

² It might be contested for the same reasons that a convention might be questioned, *e. g.*, leading to an *in integrum restitutio*.

³ *Zimmern*, Rechtsg. Vol. 3, § 169.

⁴ Dig. 49. 1, *seq.*; Cod. Theod. 11. 30; Cod. Just. 7. 62; *Zimmern*, *supra*.

⁵ See § 205, *infra*.

⁶ *Zimmern*, R. G. § 32, *seq.*; *Puchta*, § 161, *seq.*; *Hasselt*, de legis actionib., Groningen, 1824; *Schmidt*, de originib. legis actionum, Frib. 1857.

⁷ *Gaius*, IV. §§ 12. 29.

⁸ *Gaius*, IV. § 13, *sacramentum* (stake or deposit) was the general action, for wherever no other was appointed by law the procedure was by *sacramentum*.

⁹ *Gaius*, IV. § 13.

¹⁰ *Puchta*, § 161, *seq.*

¹¹ *Gaius*, IV. §§ 13. 14; *Puchta*, *supra*.

¹² *Gaius*, IV. § 16.

other party is successful, here forms an important part of the procedure *in jure*, and the suit instituted only affected the question which of the two *sacramenta* was just or unjust.¹ After the other *legis actiones* were introduced this regular institution of a suit was but seldom applicable when it related to the title (*meum esse*) of a corporeal or incorporeal thing, such as property, inheritances, servitudes and the like. In these cases the formalities of vindication were an essential element of the *sacramenti* action. Such suits were also, at the time when the *litigare per formulam* was the rule, instituted sometimes not *per formulam*, but by the *sacramenti* action. This had to be the course when the suit was to be decided not by a judge to be especially chosen, but by the centumviral forum.² The *legis actio per judicis* (*arbitrive*) *postulationem*, according to all the connection, was instituted³ when in relation to an obligation much depended on the opinion of the judge, or even on his technical knowledge, and hence the adjudication was not submitted to a standing judicature, but to several men who were partly chosen by the plaintiff, partly by the defendant with the co-operation of the magistracy, and partly by the latter. The term *judicis postulatio* here primarily denotes the formulary in which one party verbally nominates to the magistracy one of the arbiters to be named to decide the suit.⁴ The *legis actio per conditionem*, which was introduced by a *lex Silia* for demands for specific sums of money and by a *lex Culpurnia* extended to demands for the delivery of other specific things, consisted in the summoning by the alleged creditor of the alleged debtor before the magistracy by reciting a designated formulary for the demand, and that he appear again on the thirtieth day at the taking of judgment.⁵ The *legis actio per manus injectionem* was primarily intended for the case when one was adjudged to pay a sum of money or was regarded as if he had been so adjudged and did not pay within the legal period, so that it became necessary to execute the judicial sentence. In the course of time this action was extended to other cases. Subsequently its severity was considerably relaxed.⁶ The *pignoris capio*, which was employed only in several particular kinds of pecuniary matters, consisted in that the creditor, without preliminary suit and without the co-operation of the magis-

¹ Cicero pro Cæc. c. 33: *Puchta, supra*. To adjudicate here there was originally always a standing judiciary; but since a *lex Pinaria*, under certain circumstances a *judex* might be appointed: Gaius, IV. § 15.

² Gaius, IV. §§ 31, 95. But at the time of the classical jurists this was only permitted in a suit for an inheritance.

³ The leaf of the manuscript of Gaius which treats of this *legis actio* (Comm. IV between §§ 17. and 18.) is lost.

⁴ To the names of the nominees, e. g., Publius or Titium was added: *judicem arbitrumve postulo uti des*: *Puchta*, Instit. § 42; *Zimmern*, § 42.

⁵ Gaius, IV. § 18-20; *Zimmern*, § 43; *Savigny*, System, Vol. 6, p. 577; *Puchta*, Instit. § 162.

⁶ Gaius, IV. § 21-25 *Zimmern*, § 44-47; *Puchta*, § 162.

tracy, by reciting a prescribed formulary took a thing from the debtor to be treated as a pawn.¹

3. FORMULAS.

§ 204. With the usual procedure *in jure* in the middle period² the question was principally whether the formula prayed for by the plaintiff should be granted or refused (*actionem denegare*). If it were granted, then the additions (*adjectiones*) to the formula moved for by either party were to be determined and a *judex* or *recuperatores* were to be chosen;³ and that which was prescribed in the formula was to be carried out *in judicio*. The instruction⁴ contained in the formula for the judges therein named, besides the above-mentioned *adjectiones*, usually consisted of several primary parts (*partes formulæ*). They were four in number;⁵ but all of them did not appear in every formula. They were termed *demonstratio*, *intentio*, *adjudicatio* and *condemnatio*. The usual formal parts were the *intentio* and *condemnatio*, which were connected with each other as the premises and conclusion. The *intentio*⁶ contained the cause of complaint. It ran thus: "if it appear that," etc., or, "so far as it appears that N. is indebted to or bound to perform for A." The *condemnatio*,⁷ which followed as the conclusion, stated for what the defendant should be adjudged. When the complaint in the *intentio* was a question of law the instruction was termed formula *in jus*. When it was a question of fact it was termed formula *in factum concepta*.⁸ The latter was chiefly⁹ used as the means to a legal remedy, which rested on the prætorian law. Between the usual formulæ *in jus conceptæ* and the usual formulæ *in factum conceptæ* stood those¹⁰ fictitious formulas whereby a legal relation not existing will under certain conditions be presumed to exist.¹¹ An *intentio in jus conceptæ* sometimes required a confirmation by a preceding minute of the fact from which the right which forms the cause of complaint is deducible, and these formal parts were termed *demonstratio*.¹² However, the *demonstratio* occurred only in suits for demands, and probably only when the *intentio juris* was uncertain. The *demonstratio* with the nomination of a *judex* was connected with a form. It ran thus: *Quod Agerius Negidius*

¹ Gaius, IV. §§ 26-29. 32; Livy, I. 43; Zimmermann, § 48; Puchta, *supra*.

² On the cause for the introduction and the advantage of the action *per formulam*. see Zimmermann, § 32; Puchta, Instit. Vol. 2, § 163.

³ When one judge and when recuperators were to be chosen see Zimmermann, § 37; Puchta, Vol. 2, § 154.

⁴ Sometimes this went to the extent that it should be so regarded as if a certain *legis actio* had taken place. This is the meaning of the division into actions *quæ ad legis actionem exprimentur* and into actions *quæ sua vi ac potestate constant*: Gaius, IV. §§ 11. 32. 33.

⁵ Gaius, IV. § 39. On that which follows see Zimmermann, § 51. *seq.*; Puchta, § 164. *seq.*

⁶ Gaius, IV. § 41.

⁷ Gaius, IV. § 43.

⁸ Gaius, IV. § 45-47.

⁹ Gaius, IV. § 47.

¹⁰ On another kind of *fictitiæ formulæ*, see note 4, *supra*.

¹¹ Gaius, IV. § 34-36.

¹² Gaius, IV. § 40.

fundum Cornelianum vendidit, Titus Juxta esto. The fourth formal part, the *adjudicatio*,¹ only occurred in proper suits for partition and in suits for determining boundaries. By these the *juxta* was empowered to give a party exclusive property or servitude in the object of the suit or to a part of it. As by the above there were formulas which had more than two parts, so on the other hand there were such as in addition to the naming of the judge contained only an *intentio*. This was a peculiarity of that suit whose object was not the conviction or acquittal of the defendant, but was only the determining of a preliminary question on which another lawsuit depended. Such suits are termed preliminary judgments (*præjudicia*), in contradistinction from the proper judgments (*judicia*).²

Among the litigated matters for which it was necessary to set out a formula in order to proceed to judgment were also those in which the plaintiff initiated the proceeding *in jure* by praying for a provision by which the defendant was warned what he should do or omit, if the plaintiff's charges be proven, so as to avoid conviction. This conditional provision³ frequently contained a prohibition, and then it was termed interdict in its narrow and proper sense. But sometimes it imposed on the defendant to restore something to the plaintiff or to produce something to him, in which case it was formerly termed decree, but subsequently it was termed interdict. The interdicts are now divided into *prohibitoria*, *restitutoria* and *exhibitoria*.⁴ If the result of an interdict was of such a nature as not to satisfy the plaintiff he might pray for a judgment.⁵ Thereupon usually *in jure* a wager had to be made, whether the defendant had violated the prætorian edict on which the interdict was based or not. Then *recuperatores* would be named to determine which party had to pay to the other the sum of money bet.⁶ This suit was connected with another, whereby the plaintiff in the principal action sought to attain that which was already imposed (usually only conditionally) on the defendant by the interdict.⁷ Only when the interdict was not prohibitory it might under certain circumstances be requested that the wager be omitted, that the matter be brought to a result without risk, *i. e.* without penalty.⁸

§ INVESTIGATION EXTRAORDINARY (*extraordinaria cognitio*) AND NEW PROCEDURE.

§ 205 The higher judicial magistrates in the Roman state already at an early period frequently had to make investigations in order to give decisions, and make decrees themselves which affected private legal matters, but they

¹ Gaius, IV. § 42.

² Gaius, IV. § 44. See Gaius, III. § 123; § 13. I. 4. 6; fr. 30. D. 4. 2. 5.

³ Gaius, IV. § 38, *seq.* Zimmermann, § 71-74; Puchta, Instit. § 169, *seq.*

⁴ Gaius, IV. §§ 139, 140, 142. ⁵ Gaius, IV. § 141.

⁶ Gaius, IV. §§ 141, 161, 162, 165, *seq.*

⁷ Gaius, IV. §§ 165, 169. This refers to an *arbitraris* action, § 210, 2, *infra*.

⁸ Gaius, IV. §§ 141, 162, 164.

never wholly determined a proper legal litigation;¹ but they acted only in such cases as concerned the execution of a judicial sentence, the imposition of a prætorian caution for a transfer to possession (*missio in possessionem*), or the restoration to the original condition (*in integrum restitutio*). Of such magisterial functions the Romans say, *imperii magis sunt quam jurisdictionis*. Afterwards, but still at the time of the old *ordo judiciorum*, there were cases in which a suit was conducted before the magistrate to its end, and in which he also gave final judgment. These cases of the proper extraordinary investigation (*extraordinaria cognitio*)² were characterized by the consideration of matters which, according to the more early law, would have been regarded as an extraordinary stride of the power of the state, *e. g.*, in investigations of complaints of slaves against their masters, of children of the family against their fathers or grandfathers, of emancipated against their patrons,³ or for the adjudication of suits, for the nurture of near kin,⁴ respecting legacies of a new kind, *fidei-commissa*,⁵ or respecting *honoraria* which were not promised for certain services.⁶ The procedure in the *extraordinaria cognitio* was copied from the ordinary procedure so far as the circumstances of there being no judge permitted.⁷ The ordinances whereby the old *ordo judiciorum privatorum* were repealed⁸ have not descended to us completely. A constitution of Diocletian,⁹ whereby only in certain cases as exceptional a *pedaneus iudex*¹⁰ should be chosen, but before whom the suit is also to be initiated, as appears by the code, only refers to the provinces. Whether he contemporaneously prescribed it for Rome and Italy, or whether it was prescribed by Constantine at his new division of his empire, is unknown. Justinian¹¹ says generally, without designating the time of the change, that at the present day the question is determined by the extraordinary investigation (*hodie extra ordinem ius dicitur*), with which were retained all of the rules of the hitherto procedure so far as they were applicable, so that the magistrate initiating the suit had also nearly all of the functions of a judge. Even a written formula was still set out after initiation as interlocutory till Constantine's sons repealed it.¹² The complaint was also continued to be made orally in the presence of the defendant or his representative. But the defendant was no longer summoned by the plaintiff to hear it,¹³ but was summoned at the instance of the magistrate by the judicial

¹ *Puchta*, *Instit.* §§ 151. 152, beginning of § 176.

² *Dig.* 50. 13.

³ *fr.* 1. §§ 2. 10. *D.* 1. 12; § 2. *I.* 1. 8.

⁴ *fr.* 5. 6. *D.* 25. 3.

⁵ *Gaius*, II. § 278; *Ulpian*, XXV. § 12.

⁶ *fr.* 1. *D.* 50. 13.

⁷ *Zimmern*, § 142; *Puchta*, § 176.

⁸ *Zimmern*, § 89; *Puchta*, § 182, *seq.*

⁹ *Const.* 2. C. 3. 3. See, also, *Julian's Const.* 5. C. 3. 3.

¹⁰ On *pedanei iudices*, see generally *Zimmern*, § 18; *Puchta*, § 154. at the end § 182.

¹¹ *pr.* I. 3. 12 (3. 13); § 8. *I.* 4. 15. See *fr.* 47. § 1. *D.* 3. 5.

¹² *Const.* 1. C. 2. 58.

¹³ Formerly the plaintiff personally summoned the defendant *in ius*, *Dig.* 2. 4, and he was only obliged to apprise him before the magistrate of the nature of the com-

servant (executor), who at the same time communicated to the defendant the plaintiff's petition presented to the magistrate, wherein he set forth his complaint and prayed that the defendant should be summoned (*libellus conventionis*)¹ The former interdictal procedure ceased to exist, at least in the Justinian law. Instead of it there is a usual but speedy procedure, whose institution essentially depends on the same circumstances as those on which the interdicted procedure formerly depended.² The peculiarity of the former formula procedure that a proper judgment could only be for money was so far changed that under Justinian it might be also for other property.³

II. ACTIONS.⁴

A. NATURE OF ACTIONS.

§ 206. Action (*actio*) is the name given to the means employed by one who alleges that his rights have been violated, to have them judicially determined and to have judicial assistance for their enforcement. He who invokes these means is termed *actor* (plaintiff), and he against whom they are employed is termed *reus* (defendant).⁵ The right of action is always included among the relative rights, even when the provision which is to serve for the enforcement of the action belongs to the absolute rights.⁶

plaint instituted against him, *actionem edere*: Dig. 2. 13. But if the defendant were not then prepared for his defence he could require that the hearing should be postponed to another juridical day, but he had to agree to appear or pay a certain penalty, for which he had under certain circumstances to give bail. On this *vadimonium*, see Gaius, IV. § 184-187. Hence it was soon deemed preferable to avoid the first appearance before the magistrate, by making such agreement extrajudicially. Already in Cicero's time only the disobedient defendant was still summoned in the old method *in jus*: Horat. Sermon. I. 9. 74. According to an ordinance of Marcus Aurelius the defendant must at the first appointed time submit to the procedure, if the plaintiff had previously made a *litis denunciatio*, that is, had apprised the defendant of the action instituted against him and had a record made of it which the witnesses subscribed. The appointed time was then fixed by computing the legal term from the last day of the *denunciatio*: Cod. Theod. II. 4. 6.

¹ This summoning by communicating the libel was termed *conventio*.

² pr. § 8. I. 4. 15; Rubr. D. 43. 1.

³ § 32. I. 4. 6. See Gaius, IV. § 48, *seq.*

⁴ Gaius, Inst. Comment. 4; Instit. 4. 6; Dig. 44. 7; Cod. 4. 10. On the Roman right of action, see Sarigny, Syst. Vol. 5; Donellus, comm. jur. civ. Lib. 19. cap. 1. § Lib. 21. cap. 1. 2; Puchta, über die gerichtlichen Klagen, Gieszen, 1833.

⁵ There are also actions which are termed cross actions (*duplices actiones*) in which both parties are at the same time plaintiffs and defendants. The term mixed actions (*mixtæ actiones*) appears in this sense. See § 208 at the end and § 209, *infra*. Actions of partition are cross (*duplex*): fr. 2. § 3. D. 10. 2; fr. 10. D. 10. 1; fr. 13. 14. D. 5. 1; fr. 37. § 1. D. 44. 7. There are also cross interdicts (*interdicta duplexia*) by which both parties are controlled, and when they take the place of actions they are termed cross actions: § 7. I. 4. 15; fr. 37. § 1. D. 44. 7.

⁶ pr. I. 4. 6; fr. 51. D. 44. 7. See fr. 178. § 2. 3. D. 50. 16; fr. 37. pr. D. 44. 7.

B. DIVISIONS OF ACTIONS.

1. According to their Origin.

§ 207. The actions that occur in the Roman law are divided according to their origin into—

1. Either civil or honorary, according as they are founded on the civil law or have been introduced through the edicts of the prætors or of the ædiles (actions *prætorix et ædilitix*).¹

2. Actions are further divided into *directæ* or *utiles* actions. *Directæ* actions are founded on certain legal obligations which from their origin were accurately defined and recognized as actionable. *Utiles* actions are formed analogically in imitation of the *directæ* actions. They were permitted in legal obligations for which the latter were not originally intended, but which resembled the legal obligations which formed the basis of the action *directa*.² Many *utiles* actions were fictitious,³ i. e., *fictitix formulæ* were formerly used for them.⁴

3. The terms *vulgares* actions and *proclita judicia* are not synonymous with *directæ* actions, but mean actions for which at the time of the classical jurists there were fixed formulas,⁵ and they might belong to the *directæ* or to the *utiles* actions, and the formulas might be *in jus* or *in factum conceptæ*. The nature of *utiles* and *in factum* actions differs in like manner. The latter term is used for actions in which the former formulas *in factum* were drawn up,⁶ especially when these were not fixed, but had to be adapted to each individual case, and then also for an action⁷ whose former formula was drawn *in jus*,⁸ namely, the *præscriptis verbis* action,⁹ which bore that name¹⁰ because by it the *demonstratio* of the action for which suit was brought was not, as formerly, designated by a short fixed technical term like *vendidit, emiit, commo-davit*, but by several representative words taken from the individual transaction (*præscriptis verbis*).

4. The terms *persecutiones* and *interdictæ* point to a particular origin of certain actions and also to a particular procedure which was formerly observed in those actions. Those actions are still termed *persecutiones* in the

¹ § 3. I. 4. 6; fr. 25. § 2. D. 44. 7.

² fr. 21. D. 19. 5; fr. 47. § 1. D. 3. 5; fr. 29. § 7. fr. 53. D. 9. 2; *Zimmern*, *Rechtsg.* Vol. 3, § 54; *Savigny*, *System*, Vol. 5, § 215.

³ *Gaius*, IV. 34–36; *Ulpian*, XVIII. 12.

⁴ For other *utiles* actions the formula in most cases was a usual formula *in factum concepta*.

⁵ fr. 1. pr. fr. 2. fr. 11. D. 19. 5.

⁶ On the *in factum* actions, see *Savigny*, *Syst.* Vol. 5, §§ 216 and 217.

⁷ On this action, see *Zimmern*, *Rechtsg.* Vol. 3, § 54; *Savigny*, *Syst.* Vol. 5, § 217.

⁸ It was also termed action *civilis*: fr. 5. § 2. fr. 8. 15. D. 19. 5.

⁹ fr. 2. 5. §§ 2. 3. fr. 7. 15. 17. pr. fr. 19. 20. 26. D. 19. 5.

¹⁰ Action *in factum*: fr. 13. § 1. fr. 22. 24. D. 19. 5.

Corpus Juris, which originated at the time of the old *ordo judiciorum* and at that time introduced an *extraordinaria cognitio*,¹ and those actions are at the present day termed interdicts which were given instead of the former interdicts by the prætorian edict.²

2. With respect to the Foundation of Actions.

§ 208. Actions, according to their foundation, are either *in rem* or *in personam*.³

1. The action *in rem*, in a wide sense, denotes every action founded on an absolute right, and which therefore may in general be instituted against any one who invades or disputes such right. In this wide sense it comprises also the preliminary actions (*actiones præjudiciales*), i. e., those actions instituted for the determination of preliminary matters on which other litigated matters depend. This, by the Justinian law, only arises in the determination of status and family rights.⁴ In a narrow sense, actions *in rem* signify actions for property and real rights and for the enforcement of rights of inheritance. These actions are also termed in the Roman law *vindicationes*.⁵ The object of actions *in rem* is for the purpose of a judicial recognition of the plaintiff's right and to stop its violation.

2. Actions *in personam* are those which are instituted for the fulfillment of an obligation, and hence can only be instituted against the person who is bound to fulfill it (the debtor).⁶ These actions are as various in their grounds as are the obligations for whose fulfillment they are instituted. The personal actions embrace the so-called actions *in rem scriptæ*, that is, actions arising from obligations, which may be instituted against the possessor or an owner of a thing as such, for an injury suffered by another in consequence of such ownership or possession,⁷ such as noxal actions, that is, actions against the child's father or the slave's master, for injuries perpetrated by the child or slave; but subsequently they were limited to injuries by a slave only and not for injuries by a child. The division of mixed actions which is sometimes made as being partly real and partly personal is incorrect.⁸

¹ When they were private actions: fr. 178 § 2. D. 50. 16; fr. 28. D. 44. 7; fr. 2. § 3. D. 18. 4.

² See *supra*, end of § 204 and § 205, note 2, p. 173.

³ See *Sarigny*, System, Vol. 5, §§ 206. 207.

⁴ § 13. I. 4. 6. Respecting some actions of this kind, see fr. 1. § 2. D. 6. 1; fr. 5. § 18. D. 25. 3; Const. 9. C. 8. 47.

⁵ Gaius, IV. 1, 3, 5; §§ 1. 2. 15. I. 4. 6; fr. 25. pr. D. 44. 7. They are also termed *petitiones*, in their narrow sense: fr. 28. D. 44. 7; fr. 178. § 2. D. 50. 16; Tit. Dig. 5. 3.

⁶ Gaius, IV. 2; §§ 1. 15. I. 4. 6.

⁷ fr. 9. §§ 4. 8. fr. 14. §§ 3. 5. D. 4. 2; *Sarigny*, System, Vol. 5, p. 24-28.

⁸ The three actions of partition which § 20. I. 4. 6. mentions as "*mixtam causam obtinere videntur, tam in rem quam in personam*," are purely personal actions: *Sarigny*, *supra*, p. 36.

3. *Respecting the Object of Actions.*

§ 209. With respect to their object,¹ actions are either for the recovery of a thing or damages (*rei persecutendæ causa comparatæ, rei persecutoriæ*), or penal or mixed.² To the actions *rei persecutendæ causa comparatæ* belong all the actions *in rem* and those personal actions which are instituted for the delivery of a thing or to recover damages.³ Penal actions are such personal actions as are employed to recover a private penalty, which, among the Romans, consisted chiefly in the defendant's forfeiture to the plaintiff of double, triple or quadruple the amount of loss inflicted.⁴ Mixed actions, in this sense, are those actions which are designed to effect the delivery of a thing or compensation for damages, as also the payment of a private penalty.⁵ Sometimes this division proceeds from the defendant's standpoint, and compensation for the actual damages only is regarded as the penalty if the defendant does not gain by the annulment of the act complained of.⁶

4. *With respect to Judicial Proceedings.*

§ 210. With respect to judicial proceedings, actions were divided in the Roman law into—

1. *Stricti juris* and *bonæ fidei*.⁷ This division related only to personal actions,⁸ for which formerly a formula *in jus concepta* was introduced. *Bonæ fidei* actions are the plaints founded on contracts or quasi contracts, in which the judge must regard the *bona fides*, i. e., such matters as may be expected from a reasonable man, while the civil law personal actions, which are ad-

¹ The actions *in rem*, in their narrow sense, are also divided into actions for single things and actions for totalities (*universitates*): fr. 1. pr. § 1. 3. fr. 73. D. 6. 1; Const. 3. pr. C. 7. 39. The personal actions and primarily the *bonæ fidei* actions are, in fr. 38. p. D. 17. 2, partly termed general, partly termed special and partly judicial.

² Gaius, IV. 6-9; § 16. I. 4. 6.

³ § 17. I. 4. 6.

⁴ §§ 18. 21-25. I. 4. 6. See § 479, *infra*.

⁵ § 19. I. 4. 6. In one action the private penalty is that the damages are estimated especially disadvantageously to the defendant: § 9. I. 4. 3. The increased damages are not demandable if payment be made before suit: § 19. in f. § 26. in f. I. 4. 6; and sometimes if payment be made before judgment: § 27. I. 4. 6; fr. 1. pr. D. 39. 40. In some actions the claim is for double the amount of the loss: §§ 23. 26. I. 4. 6; § 4. I. 3. 27. (3. 28); fr. 7. D. 46. 3; Gaius, IV. §§ 9. 171-173; Novel 18. c. 8.

⁶ See, e. g., fr. 4. § 6; fr. 7. D. 4. 7; fr. 9. § 8. fr. 11. D. 42. 5; fr. 1. § 5. D. 43. 4; fr. 1. pr. § 1. D. 43. 16; fr. 26. 35. pr. D. 44. 7.

⁷ Gaius, IV. 61-68; § 28-30. I. 4. 6; Gans, Scholia to Gaius, p. 388, and his Röm. Obligationenrecht, Abh. 1; Zimmermann, Rechtsg. Vol. 3, § 60, *seq.*; Savigny, System, Vol. 5, § 218-220, and Supplements 13 and 14.

⁸ The action for an inheritance (*hereditatis petitio*) was first declared by Justinian to be an action *bonæ fidei*: Const. 12. § 3. C. 3. 31; § 28. I. 4. 6. On this point see Savigny, *supra*, p. 478.

judged only by the strict law, are termed *stricti juris* actions. This important distinction, under Justinian, was naturally no longer observed, because of the constitution of the formula, but it, notwithstanding, continued to exist.¹ Which actions belonged to one class and which to the other, and their distinctions, will be treated of under the right of obligations.

2. The *arbitrarie* actions² originated at the time of the formula process, for many cases in which the plaintiff's claim was not for money,³ for which there could be only a proper judgment against the defendant. These were actions when the plaintiff's claim was just, in which the judge did not immediately adjudge the defendant to pay money, but first imposed on him an interlocutory judgment (*arbitratus judicis*) to perform the object of the plaintiff's claim; and if such judgment were obeyed, he delivered an absolute judgment, but if it were disobeyed, then, at the plaintiff's request, the defendant was adjudged to pay money,⁴ which was disadvantageous to the defendant, because the plaintiff was usually permitted to estimate his damages on his own oath (*jusjurandum in litem*);⁵ and the defendant also sometimes by adjudgment became infamous,⁶ and this was in an action for fourfold damages.⁷ The *arbitratus judicis* was usually a mandate *de restituendo* or *de exhibendo*; ⁸ it was only in one case for another object.⁹ Included in the *arbitrarie* actions were all actions *in rem*, in a narrow sense, and a number of personal actions.¹⁰ The *arbitrarie* actions retained the foregoing characteristics even under Justinian, with the modification that the plaintiff, at least when the interlocutory judgment was for restitution, could insist on the forcible execution of this judgment if he preferred it to a pecuniary judgment.¹¹

C. CONCURRENCE OF ACTIONS.¹²

§ 211. A concurrence of actions exists when several actions vest in the same person; it is of two principal kinds, objective and subjective.

1. An objective concurrence is when one plaintiff has several actions against the same defendant. This is generally termed a cumulative concur-

¹ This also appears from the passages cited of the Institutes and from numerous other passages in the Corpus Juris.

² *Zimmern*, Rechtsg. Vol. 3, §§ 67. 68; *Savigny*, System, Vol. 5, § 221-223.

³ This is only in one case, which, however, could be for money, but the judgment should be for the payment at a different place than that agreed on, and hence also usually for a different sum. See Dig. 13. 4.

⁴ § 31. I. 4. 6.

⁵ Dig. 12. 2.

⁶ Namely, in the action *doli*.

⁷ fr. 14. §§ 1. 3. in f. §§ 4. 7. 11. D. 4. 2

⁸ § 31. I. 4. 6.

⁹ See note 3, to which the words "*vel solvat*," in § 31. I. 4. 6, refer.

¹⁰ § 31. I. 4. 6.

¹¹ fr. 68. D. 6. 1; *Savigny*, System, Vol. 5, p. 122, seq.

¹² *Cujas*, obs. Lib. 8. c. 24; *Donellus*, comm. jur. civ. Lib. 21. c. 3; *Glück*, Comm. Vol. 4, § 284, a; *Savigny*, System, Vol. 5, § 231-236.

rence, *i. e.*, when the several actions may be instituted contemporaneously or successively, with full effect. However, there are cases in which the only effect of one concurrent action is that it is preparatory to the institution of another,¹ and then the concurrence is termed successive.² Concurrent actions sometimes serve to make effectual rights which the plaintiff has only alternate, but in which he must elect. and by the institution of one action the other actions are lost.³ Such concurrence is termed alternative or elective. It is also a principle of the Roman law that he to whom several actions are given which serve for the attainment of the same object, if by the means of one he has already obtained a part, can institute another action only for that which was not secured by the first.⁴ And in several cases of this kind, as exceptions to the rule, by the simple institution of one action the others are lost.⁵ Such a concurrence is termed elective.

2. A subjective concurrence is when an action may be instituted either by several plaintiffs against one defendant or by one plaintiff against several defendants, or by several plaintiffs against several defendants. Generally all the several actions may be instituted either contemporaneously or successively with full effect; but if for the attainment of the same object actions be given to one plaintiff against several defendants, then the same principle governs as where different actions against the same defendant have the same object,⁶ and sometimes by the institution of one action another is lost.⁷

D. TRANSITION OF ACTIONS.

§ 212. Actions descend generally *ipso jure* by universal succession (*successio per universitatem*), both actively to the heirs of the party entitled and passively to the heirs of the party burdened. The rule is subject to the following exceptions:

a. Penal actions cannot be instituted against the heirs of the offender,⁸ nor can actions for the recovery of the thing (*rei persecutoriæ*), or mixed actions arising from wrongs, be instituted against the heirs, excepting so far as they have been enriched by the offence.⁹

b. The actions *quæ vindictam spirant*, *i. e.*, those actions which a man

¹ See fr. 3. § 6. D. 10. 4.

² This term is also used where one action must be previously instituted in order to permit the institution of another. See fr. 23. § 6. D. 6. 1; fr. 1. § 1. D. 10. 2; fr. 20. § 4. fr. 44. pr. D. 10. 2; fr. 4. § 2. D. 10. 3.

³ fr. 19. D. 31; fr. 112. pr. D. 45. 1; fr. 4. § 2. fr. 7. D. 18. 3; fr. 9. § 1. D. 14. 4; fr. 4. § 3. D. 9. 4; Const. 4. C. 4. 54.

⁴ fr. 57. D. 50. 17; fr. 41. § 1. D. 44. 7. See fr. 43. § 1. D. 50. 17. Applications of this rule are in, *e. g.*, fr. 34. §§ 1. 2. D. 44. 7; fr. 38. § 1. fr. 43. 47. pr. D. 17. 2; fr. 7. § 1. D. 13. 6; fr. 3. § 2. D. 47. 1; fr. 47. § 1; fr. 50. D. 17. 2.

⁵ See, *e. g.*, Const. 8. C. 6. 36.

⁶ See, *e. g.*, fr. 17. pr. D. 4. 3; fr. 1. § 10; fr. 4. D. 9. 3.

⁷ See, *e. g.*, fr. 1. § 3. D. 47. 5.

⁸ fr. 1. pr. D. 47. 1; fr. 111. § 1. D. 50. 17.

⁹ fr. 38. 127. D. 50. 17; Const. un. C. 4. 17.

who, without having suffered an actual loss of property, may institute from mere resentment of personal injuries,¹ do not descend to the heirs of the plaintiff, but when instituted descend to the heirs and against the defendant's heirs.² The transfer of single actions to another during the lifetime of the entitled party by means of singular succession can only be effected by cession or delegation.³

E. DURATION OF ACTIONS.

1. *The Rule.*

§ 213. Every action must from its nature become extinct when the right ceases for whose prosecution it was instituted. But in general, so long as the right lasts, it depends on the entitled party whether and when he will institute his action.⁴ This was also the rule in the older Roman law, i. e., the right of action was generally perpetual, and only in some, especially in the prætorian actions, a certain term was specified within which they were to be instituted, on pain of losing them. Hence these were termed temporal actions, in contradistinction from perpetual.⁵ In the modern Roman law, on the contrary, a term of thirty years is generally prescribed for every action which previously was perpetual,⁶ so that at the expiration of this legal term it may be defeated and annulled by the exception *temporis s. præscriptio* of thirty years. This extinction of actions, because of neglect to institute them within the legal term, is called by the moderns the prescription of actions,⁷ and this is a kind of extinctive prescription.⁸

2. *Exceptions to the Rule.*

§ 214. The rule of the modern Roman law that actions become extinct in thirty years from the time when the right to institute them accrues⁹ is subject to the following exceptions:

1. Some actions, according to the Justinian law, are not subject to any limitation. Included in these are¹⁰ the action of the Fiscus for arrears of taxes.¹¹

2. Prescription does not run against the actions of pupils during impubescence and tutelage.¹²

¹ Gaius, IV. 112; § 1. I. 4. 12.

² fr. 26. 33. 58. D. 44. 7; fr. 139. pr. fr. 164. D. 50. 17.

³ See § 364, *seq.*, § 538, *infra*.

⁴ Gaius, IV. 110; pr. I. 4. 12.

⁵ Const. 3-9; C. 7. 39; Cod. 7. 40.

⁶ *Thibaut*, über besitz u. Verjährung, p. 117; *Unterholzner*, Verjährungslehre, Vol. 2, p. 256, *seq.*; *Savigny*, System, Vol. 5, § 237-252.

⁷ See § 286, *infra*, note 2.

⁸ Const. 3. Const. 7. § 4. C. 7. 39.

⁹ On three other cases, see Const. 3. C. 7. 22; Const. 5. C. 7. 39; Const. 23. C. 11. 47.

¹⁰ Const. 6. C. 7. 39.

¹¹ Const. 3. C. 7. 39. The prescription of thirty years commences, in regard to minors, from the time that they attain pubescence. But the prescription

3. Other actions are extinguished in forty years from the time that they have accrued. Included in these are actions for the patrimonial property of the regent, the actions of churches and charitable institutions,¹ the action *hypothecaria*, so far as it may be instituted against the debtor himself and his heirs.² If prescription has been tolled by the institution of an action, such action becomes extinguished by prescription after forty years from the time of the last judicial proceedings therein, though it otherwise might have become extinct by prescription in a shorter period (*præscriptio litis pendentis*).³

4. Lastly, all the old temporal actions which formerly were always limited to a certain and even shorter term than thirty years are still extinguished in this shorter period.⁴ Especially included in this rule are all the prætorian actions *ex delicto*, the interdicts against violent disturbance of possession, and also actions for restitution, the actions *ædilitiæ* (by the ædilian edict), and the actions arising from inofficious testaments (*querela inofficiosi testamenti*).⁵

3. Special Principles in the Prescription of Actions.

§ 215. Respecting the extinction of actions by prescription there are the following special rules:

1. The legal principle for the prescription of actions is founded solely on the negligence of the party entitled to prosecute his right, hence the *bona fides* of the defendant is not considered.⁶

2. The prescription of an action begins only at the time when the right of action accrues,⁷ and when it is possible for the plaintiff to institute it.⁸

3. The term of prescription in actions which are extinguished in thirty or forty years is always an unbroken succession of time (*tempus continuum*), and in some temporal actions the juridical days (*tempus utile*) (§ 195, *supra*); but in all cases the prescription is not completed till the last day of the term (*dies novissimus*) has wholly passed.⁹

of temporal actions to which an impubescent or minor is entitled, commences at the time of attaining his majority: Const. 5. C. 2. 41; *Götschen*, Grundr. zu Pand.-Vorl. p. 71.

¹ Const. 4. 6. C. 7. 39; Const. 14. C. 11. 61. The actions of churches and benevolent institutions, according to Justinian's earlier ordinances, were extinguished by the prescription of one hundred years: Const. 23. C. 1. 2; Novel 9; but it was subsequently reduced by him to forty years: Novel 111; Novel 131. c. 6.

² Const. 7. § 1. C. 7. 39. See *infra*, § 356, 6.

³ Const. 9. C. 7. 39; Const. 1. § 1. C. 7. 40.

⁴ Const. 3. C. 7. 39.

⁵ pr. I. 4. 12; fr. 28. D. 21. 1; fr. 8. § 17. fr. 9. D. 5. 2.

⁶ Const. 8. § 1. C. 7. 39: "*Si vero mala fide*," etc. Thus also by the older canon law: can. 15. C. 16. qu. 3; *Unterholzner*, Verjährungslehre, Vol. 1, p. 313; *Savigny*, System, Vol. 5, § 244, *seq.*

⁷ Const. 3. C. 7. 39; Const. 7. § 4. C. 7. 39; Const. 1. § 1. C. 7. 40; fr. 9. § 3. D. 13. 7.

⁸ Const. 30. C. 5. 12⁴; Const. 4. C. 6. 61; Novel 22. c. 24.

⁹ fr. 6. D. 44. 7. See *Glück*, Com. Vol. 3, § 269; *Unterholzner*, Verjährungslehre, Vol. 1, p. 296, *seq.*; *Savigny*, System, Vol. 4, § 182-188.

4. The prescription of a right of action is interrupted by the institution of the action,¹ or by entering a protest in the proper form,² or by an express or tacit acknowledgment of the debt by the debtor within the term of prescription.³

5. The effect of the prescription of an action is that it founds a peremptory exception (*perpetua s. peremptoria exceptio s. præscriptio*) against the action.

6. A restitution is never granted where the term of prescription of thirty years or longer has passed.⁴

III. EXCEPTIONS.⁵

A. THEIR NATURE.

§ 216. The defence to an action can be effected in various ways, viz.:⁶

1. By a simple denial of the facts on which the action is founded.

2. By the defendant alleging other facts to show that the plaintiff either originally had no right of action, or that his right of action subsequently ceased, *e. g.*, by appealing to a testament against an action by the legal heirs, or by alleging payment against a personal action.

3. Or when he alleges a right by virtue of which he can demand that the plaintiff shall be nonsuited, even if his action be founded on an actually subsisting right, *e. g.*, by pleading a pledge against an action for the property pledged, or by pleading against a personal action a pact that the plaintiff will not enforce his demand (*pactum de non petendo*). He who in the procedure *per formulam*⁷ desired to defend himself in the manner specified under this head petitioned the proper officer to insert a clause in the formula, the effect of which was that the judgment against him which otherwise would have been rendered when only the cause of action specified in the *intentio* proved true was also made to depend on the condition that the allegation in the clause should not prove unfounded.⁸ Such an *adjectio* (insertion) from the manner

¹ The rule respecting the temporal actions was, *litis contestatione perpetuantur*, and this was also incorporated into Justinian's Pandects: fr. 9. § 3. D. 12. 2; fr. ult. in f. D. 27. 6. But a simple convention may interrupt the prescription of the perpetual actions: Const. 3. 7. § 5. C. 7. 39.

² Const. 2. 3. C. 7. 40.

³ *E. g.*, Const. 7. § 5. Const. 8. § 4. C. 7. 39; fr. 18. § 1. D. 13. 5; Const. 5. C. 8. 40; Const. 19. C. 4. 21.

⁴ Const. 3. 4. C. 7. 39; *Unterholzner*, Vol. 1, §§ 136, 137. See *Savigny*, Syst. Vol. 3. p. 421-423.

⁵ *Gaius*, IV. 115, *seq.*: Inst. 4. 13; Dig. 44. 1; Cod. 8. 36; *Donellus*, comm. jur. civ. Lib. 16. c. 2, Lib. 22, Lib. 24, c. 1, and the works cited in § 206, *supra*, note 4, and § 219, *infra*, note 6; *Savigny*, Syst. Vol. 5, p. 150, *seq.*

⁶ There is to be distinguished from the three modes of defence mentioned in the text the defence by a simple legal deduction (demurrer), *i. e.* by showing that the positive law does not give such a right of action as the plaintiff seeks to enforce, or that, at least, such right cannot arise from the facts adduced.

⁷ There were no exceptions in the procedure *per legis actionem*: *Gaius*, IV. § 108.

⁸ When the defendant's allegation is admitted *in jure* by the plaintiff, the proper officer, instead of inserting such a clause in the formula, wholly refused the formula. See, *e. g.*, fr. 9. pr. § 5. D. 12. 2; fr. 7. § 6. D. 14. 6.

of its formation is now termed *exceptio*.¹ It is said of him who prayed for it, *exceptionem petit, exceptionem objicit, exceptione utitur*. These and similar expressions were retained after the abolition of the *formulae*, to designate this mode of defence against the action.² In the new sources of the Roman law, the word *exceptio* in a wider improper sense is seldom used for the defence under the second head,³ whose distinction from the proper exceptions in the new procedure did not appear so frequently as in the former procedure.

B. THE DIFFERENT KINDS OF EXCEPTIONS.

§ 217. The true exceptions of the Roman law are founded—

1. With regard to their origin on the prætorian edict or at least on the judgment of the prætor. They frequently served to enforce the doctrines of the civil law, and hence their division into civil and prætorian or honorary.⁴

2. With regard to their effect they are either peremptory or perpetual when they destroy the action, either wholly, partially or perpetually, or dilatory or temporary when they are intended only as a temporary defence to the action.⁵

3. With regard to their subject they are either exceptions originated for or appertaining to the person, *in personam conceptæ s. personæ cohærentes*, according as they are either strictly personal, and hence may be alleged only by the person himself to whom they are granted by law, or *in rem conceptæ s. personæ cohærentes*, according as they are connected with the legal circumstances on which the suit is founded, and hence may be alleged by any one interested in the case, and especially by the heirs and sureties of the proper debtor.⁷

¹ Gaius, IV. § 116, *seq.*, especially § 119. Originally in some cases the clause was differently formed and had a different position, and was not termed *exceptio*, but *præscriptio* and *præscriptio pro reo*; but these exceptions had ceased at the time of Gaius: Gaius, IV. § 133. And the term *præscriptio* was gradually used to signify the same as *exceptio*, as frequently appears in the Corpus Juris. See, *e. g.*, Rubr. et Const. 8. 12. C. 8. 36. The *bonæ fidei* action had the peculiarity of rendering the use of certain exceptions superfluous, in consequence of the manner in which the *intentio* was formed. It is said, *doli exceptio inest bonæ fidei iudicio (actioni, formulæ)*; fr. 84. § 5. D. 30; fr. 21. in f. D. 24. 3. By *doli exceptio* was understood the *exceptio* bearing this name, which rendered every other *exceptio* superfluous. On this, see Gaius, IV. § 119; fr. 36. in f. D. 45. 1; fr. 2. § 3-5. D. 44. 4; Savigny, Syst. Vol. 5, p. 467.

² See Gaius, IV. § 119.

³ See the citations in note 5, p. 181, and the whole of the title; Inst. 4. 13.

⁴ *E. g.*, in Const. 30. C. 5. 12. This is the general term used in practice at the present day. There are only two kinds of defences against an action—the *litis contestatio negativa*, in which the modes of defence mentioned under head 1 are understood to be included, and the exceptions which set out affirmative matter, such as payment (*exceptio solutionis*), which in the Roman law was not an exception. Gaius, III. § 168.

⁵ Gaius, IV. 118; § 7. I. 4. 13.

⁶ Gaius, IV. 120-125; § 8-10. I. 4. 13; fr. 3. pr. D. 44. 1. See, also, § 219, *infra*, note 1, p. 185.

⁷ fr. 7. D. 44. 1; § 4. I. 4. 14; fr. 24. 25. D. 42. 1.

C. REPLICATIONS, DUPLICATIONS, ETC.

§ 218. The plaintiff's answer to an exception in the Roman law may be as various as the defendant's answer may be to the plaint. The plaintiff's answer to the defence alleged in the defendant's exception is termed a replication, the purpose of which is to nullify the alleged defence. Thus, the defendant pleads a *pactum de non petendo* (pact not to sue), and the plaintiff alleges in reply that the defendant obtained the pact by fraud; then in the Roman formula process it is necessary to insert an especial clause in the formula, which may be regarded as an exception to the exception (*exceptio exceptionis*), and is termed *replicatio*.¹ This term is still used in the Roman law for such an answer.² The relation of the *replicatio* to the *exceptio* is like the relation of the *exceptio* to the plaint. The defendant's answer to the *replicatio* is termed *duplicatio*,³ and the plaintiff's answer to this is termed *triplicatio*, and so on.⁴ Exceptions, replications, etc., are generally imprescriptible, because their use depends on the institution of the plaint.⁵

IV. LITIS CONTESTATIO.⁶

§ 219. The *litis contestatio* was in the older Roman law a formal act of both of the parties with which the proceedings *in jure* were closed when they led to a judicial investigation, and by which the neighbors whom the parties brought with them were called to testify.⁷ This act, respecting which precise particulars are lacking,⁸ was obsolete already at the time of the proceedings *per formulam*. But a law-suit was always termed *lis contestata* when it was conducted by the proper officer.⁹ This term means the same as the acceptance of jurisdiction (*judicium acceptum*),¹⁰ the constituting of jurisdiction (*judicium constitutum*), the matter drawn into jurisdiction¹¹ (*res in judicium deducta*).¹² In the *extraordinaria cognitio*, *litis contestatio* meant those transactions introductory to the suit, which in the ancient ordinary procedure took

¹ Gaius, IV. § 126; fr. 22. § 1. D. 44. 1.

² Pr. I. 4. 14; fr. 2. § 1. D. 44. 1; *e. g.*, fr. 9. § 4. D. 12. 2.

³ Gaius, IV. § 127; § 1. I. 1. 14.

⁴ Gaius, IV. § 128; § 3. I. 1. 14; fr. 2. § 2. 3. D. 44. 1.

⁵ fr. 5. § 6. D. 44. 4; Const. 5. 6. C. 8. 36. The *exceptio non numerate pecunie* is an exception to the rule. See § 457 and § 458 and 534, *infra*; fr. 2. § 1-3 fr. 22. 1. D. 44. 1; Const. 6. C. 8. 26. But see fr. 9. § 4. D. 12. 2.

⁶ Cod. 3-9; *Donellus*, comm. jur. civ. Lib. 24. c. 1; *Glück*, Comm. Vol. 6. § 409; *Spengel*, über Litiscont., Munich, 1827; *Keller*, über Litiscont., Zurich, 1827; *Mayer*, von der Litiscont., Stuttgart, 1830; *Savigny*, Syst. Vol. 6, p. 1, 256. See *Glück*, Comm. Vol. 6, § 499.

⁷ *Festus*, v. *contestari*.

⁸ See *Keller* and *Mayer*, *supra*.

⁹ Cicero pro Roscio com. c. 12; Gaius, III. §§ 180. 181; fr. 16. 17. D. 3. 3; fr. 25. D. 6. 1; fr. 25. § 8. D. 21. 1.

¹⁰ fr. 16. D. 3. 3 fr. 28. § 2. D. 5. 1.

¹¹ Cicero orat. part. c. 28; de invent. II 19; pro Cæc. c. 3; fr. 48. pr. D. 39. 6.

¹² Gaius, III. §§ 180. 181; IV. § 106-108; fr. 31. D. 5. 1; Const. un. C. 3. 9; Const. J. C. 3. 31.

place before the proper officer, and in this sense it also occurs in the Justinian law.¹ A law-suit by its institution and final determination has great influence on the circumstances or facts respecting which it was instituted. The Roman law ascribes this influence chiefly to the *litis contestatio*. The changes suffered by the litigated legal relations in consequence of the *litis contestatio* do not benefit the plaintiff only, but are of advantage to the defendant. In the ancient *ordo judiciorum* the rule prevailed that the plaintiff's right of action which then existed was extinguished by the *litis contestatio*, because a new right arose by the institution of the suit and the judgment expected by its prosecution.² Still in the proceedings *per formulam*³ the right of action ceased *ipso jure* under certain circumstances⁴ when the action was personal and the formula had an *intentio juris civilis*, and everywhere when the foregoing did not occur the plaintiff who did not regard the *litis contestatio* could be opposed by the exception of the matter being under judgment (*exceptio rei in judicium deductæ*).⁵ The consequences of the extinction by suit combined with the inflexible constitution and verbal interpretation of the formulas were that when too much was demanded in the *intentio* the plaintiff generally received nothing;⁶ that an established dilatory exception had the same effect as a peremptory,⁷ and that he who instituted a personal action with an *incerta intentio* lost his claim to those performances arising out of the alleged obligations which at the time were not due, if he did not especially reserve them to himself by the insertion in the formula of the clause limiting the claim (*præscriptio pro actore*).⁸ Further, as at that period a tribunal was only constituted for a certain time,⁹ another consequence of the extinction by suit was that the plaintiff wholly lost his claim if he obtained no judgment during that time. When the ancient *ordo judiciorum* ceased to exist the consequences gradually changed. A right of action was no longer *ipso jure* lost through the *litis contestatio*, because all the circumstances under which it formerly occurred could no longer take place. The exception of being

¹ Const. un. C. 3. 9; Const. 14. § 1. C. 3. 1.

² This new right was also extinguished as soon as a legal final judgment was pronounced, and in its stead arose the *judicatum facere oportere*, when the judgment was condemnatory.

³ In the procedure *per legis actionem* the old right of action always ceased *ipso jure*: Gaius, IV. § 108.

⁴ Namely, when a legal court (*legitimum judicium*) not a *judicium, quod imperio continetur*, s. *judicium imperio continens* (an action ending with the prætorship) was instituted: Gaius, IV. § 107; III. §§ 180. 181. Provided that the case occurred within Rome or its boundaries, that it did not come before recuperators, and that the parties and the judges were Roman citizens: Gaius, IV. § 103-105.

⁵ Gaius, IV. §§ 106. 107; III. §§ 180. 181.

⁶ Gaius, IV. § 53, seq., 68.

⁷ Gaius, IV. § 123.

⁸ Gaius, IV. §§ 130-132. 136. 137.

⁹ Namely, when it was a *judicium imperio continens* only for the official term of the magistrate who gave the formula, and when according to the lex Julia it was a legal court (*legitimum judicium*) only for eighteen months: Gaius, IV. §§ 104. 105.

under judgment (*rei in iudicium deductæ*) mentioned above is not spoken of in Justinian's books, and the above mentioned especial consequences of extinction by suit gradually ceased to exist.¹ And by the Justinian law the matters of contest are not extinguished by the *litis contestatio*;² yet they are modified in a number of important particulars. Thus, by it a temporal action is perpetuated (§ 215, *supra*, note 5), and the usucapion completed after it does not prevent the plaintiff's recovery.³ An action which otherwise did not descend to or against the heirs by it attains that quality (§ 212, *supra*). The matter of the suit by it becomes a litigated thing (*res litigiosa*), so that the plaintiff cannot cede the suit instituted and the defendant cannot alienate the thing which is the object of the litigation.⁴

V. RESTORATION TO THE PREVIOUS CONDITION (*in integrum restitutio*).⁵

A. GENERAL PRINCIPLES.

1. Its Nature.

§ 220. The Roman *restitutio in integrum*, or restoration to the previous condition, was effected by the prætor for equitable causes, on the prayer of an injured party, by annulling a transaction valid by the strict law, or annulling a change in the legal condition produced by an omission, and restoring the parties to their previous legal relations.⁶ These restorations may be granted in criminal as well as in civil cases. The *restitutiones in integrum* are founded chiefly on the prætorian edict, but were subsequently extended by constitutions⁷ to other causes.

2. Requisites for Restoration.⁸

§ 221. The general requisites and conditions for a *restitutio in integrum* are.

¹ On demanding of too much (*plus petitio*), see § 33. I. 4. 6; § 10. I. 4. 13. On the effect of dilatory pleas, § 10. I. 4. 13. The limitation of actions was changed to thirty years, and since Justinian's Const. 9. C. 7. 39 to forty years, which is generally termed the limitation of *lis pendens* (§ 214, *supra*).

² Nor are they extinguished by final judgment.

³ fr. 18. 20. 21. D. 6. 1.

⁴ Dig. 44. 6; Cod. 8. 37; fr. 13. D. 10. 2. According to Novel 112. c. 1. the defendant cannot alienate the matter of the contest after the *conventio*.

⁵ SOURCES.—Paul, Sent. rec. I. 7-9; Cod. Theod. II. 15. 16; Dig. IV. 1-7; 44. 4; Cod. Just. II. 20-55. LITERATURE.—*Sforzia Oddus*, de restitutione in integrum, Venice, 1584, and Frankfort, 1672; *Cujas*, in his works, Vol. 1, p. 975, *seq.*; *Donellus*, Comm. jur. civ. Lib. 21. c. 4-14; *Duarenii*, Comm. in primam partem, Pand. Lib. 4. tit. 1-6. in his works, p. 74, *seq.*; *Dompierre de Jonquieres*, de restitutionibus in integrum, Leyden, 1767; *A. G. Prasse*, Historia jur. civilis de restitut. in integr., Leipsic, 1779; *J. N. Roeder*, de restitut. in integr., Hildburgh., 1783; *Gmelin*, Principia generalia restitutionis in integrum prætorie, Tübingen, 1809; *Glück*, Comm. Vol. 5, § 431-459, Vol. 6, § 460-473; *Burchardi*, die Lehre von der Wiedereinsetzung, Göttingen, 1831; *Savigny*, System, Vol. 7, p. 99, *seq.*

⁶ Paul, Sent. rec. I. 7. 1; fr. 1. § 27. D. 48. 18; fr. 27. D. 48. 19; Const. 1. C. 9. 51. Hence it is also termed restoration of the loss because of the civil law or restoration (*reintegratio causæ jure civili amissæ*, or *instauratio negotii*): Const. 2. C. 2. 41, Const. 2. C. 2. 22; *Burchardi*, §§ 1. 3.

⁷ See p. 190, note 6, and § 230, *infra*.

⁸ *Burchardi*, § 4-11.

1. That a party should have suffered a not unimportant injury¹ in consequence of an act or omission without his own fault.²

2. A just cause for restitution.³

3. The absence of any other legal remedy for obtaining relief from the injury. In general, no restitution is granted when the act is invalid by the civil law or when its validity may be contested.⁴

3. Procedure in Restitution.

§ 222. As restitution is to be regarded as an equitable favor, hence it must always be prayed for.⁵ The mode in which restitution is to be sought is—

1. Directly by an action, when the injured party cannot enforce his right by means of an exception, because he had already performed his part. In this case, by the ancient Roman law, a double proceeding took place, namely, the *judicium rescindens* and the *judicium rescissorium*.⁶ In the former the question to be decided was whether the circumstances of the case were such as to entitle the party to restitution, and this preliminary question the prætor decided by an extraordinary inquiry (*extraordinaria cognitio*). If the restitution was granted to the plaintiff, his former right and his former action were restored to him as fully as though they had never been lost, and he could then institute against his adversary the action *rescissoria* or *institutoria*.⁷ A distinction was made between the restitution of the legal remedy and its consequence. After the prætor granted the action for restitution he directed a *judicium*, which, at the time of the ancient *ordo judiciorum*, was before the *judex*.

2. Sometimes the prætor ordered *causa cognita* (without referring to a *judex*) the transaction to be wholly annulled,⁸ because it was necessary either

¹ fr. 7. pr. D. 4. 1; fr. 16. 27. D. 4. 6; fr. 11. §§ 4. 5. fr. 7. § 6. D. 4. 4; fr. 21. § 6. D. 4. 2. Minors only may be restored because of their imprudence: fr. 44. D. 4. 4; Gaius, II. 163; IV. 57.

² fr. 4. D. 4. 1; fr. 9. pr. fr. 16. § 4. fr. 49. D. 4. 4.

³ fr. 1-3. D. 4. 1.

⁴ fr. 16. pr. § 1-4. D. 4. 4; fr. 1. §§ 1. 7. 8. fr. 7. D. 4. 3; fr. 21. § 3. D. 4. 2. For exceptions to this rule, see Const. 3. C. 2. 20; Const. 3. C. 2. 25.

⁵ fr. 69. D. 50. 17; fr. 25. § 1. D. 4. 4; Burchardi, § 23.

⁶ The procedure before the prætor on the granting of the *rescissoria* action was not a *judicium*, but the moderns term it *judicium rescindens*, in contradistinction from *judicium rescissorium*.

⁷ § 5. I. 4. 6; fr. 9. § 4. D. 4. 2; fr. 13. § 1. D. 4. 4; fr. 28. § 6. D. 4. 6; fr. 7. § 3. D. 27. 6; fr. 46. § 3. D. 3. 3; Const. 18. C. 8. 51. The investigation by the prætor was in general simply on the allowing of the *rescissoria* action, and his allowance of it included the constituting of the *rescissorium judicium*, which immediately united itself to the *judicium rescindens*. But one could also petition the prætor for only securing the *rescissoria* action in the meantime. See Glück, Comm. Vol. 5, p. 408; Burchardi, §§ 24. 25.

⁸ fr. 13. § 1. fr. 24. § 4. D. 4. 4; fr. 2. pr. D. 4. 6; fr. 9. § 4. D. 12. 2; fr. 39. pr. D. 21. 2.

to decree that the previous condition be restored,¹ or that the prætor as prætor (hence, anciently, *extra ordinem*) ordered only that the injury be removed.²

3. Sometimes, for the object which characterizes the *in integrum restitutio*, the prætor gave a special *exceptio* or *arbitraria* action, so that the truth of the facts on which it was alleged that restitution should be made should be inquired into, but not by the prætor at the time of the ancient *ordo judiciorum*, but by the *iudex*. But such cases are at most within the sphere of the *in integrum restitutio* only when the prætor grants the action or exception *causa cognita*.³

4. Duration of Restitution.⁴

§ 223. The claim to restitution is generally lost if it be not made within a certain time, which by the Justinian law is four years.⁵ In restitution, because of minority, this term begins to run from the time of the attainment of majority; but in restitution, because of absence and other disabilities, from the time such disability ceases.⁶

5. Effect of Restitution.

§ 224. The general effect of restitution is that everything, as far as possible, is restored to the condition in which it was before the act; consequently,

1. Each party must return what he has received from the other, together with all the accessions and fruits, so far as the latter have not been compensated by the interest on the money to be returned;⁷ and each must repay the other the necessary and usual expenditures which he paid on the thing while in his possession.⁸

2. When restitution is granted of a lost or surrendered right the party recovering is released from any obligation that he may have assumed.⁹

¹ *E. g.*, in restitution against entry into an inheritance.

² *E. g.*, fr. 24. § 4. D. 4. 4.

³ fr. 3. D. 4. 1. On this kind of exception, see fr. 28. § 5. D. 4. 6. On a replication, fr. 9. § 4. D. 12. 2. On the other hand, the *doli* as well as the *metus* exception was granted without a preliminary *causa cognitio*. The action *doli* should be given always only *causa cognita*: fr. 1. § 1. fr. 9. § 5. fr. 10. 11. D. 4. 3.

⁴ *Unterholzner*, Verjährungslehre, Vol. 2, p. 1, *seq.*; *Burchardi*, § 27.

⁵ By the more ancient law all restitutions, excepting those which were granted on account of loss of status (*propter capitis deminutionem*) (§ 233, *infra*), could be acquired only within a juridical year: pr. I. 4. 12; fr. 35. pr. in f. D. 44. 7. Constantine, who granted two continuous years (instead of the juridical year) within which the action *de dolo malo* might be instituted (Const. un. C. Th. 2. 15; Const. un. C. 2. 21) for restitution, because of minority, prescribed a continuous time, which consisted of three, four or five years, according to locality: Const. 2. pr. O. Th. 2. 16. See Const. 5. Cod. Just. 2. 53. Justinian by the Const. 7. C. 2. 53. abrogated this distinction, and in this respect made the time for restitution of adults and minors the same.

⁶ Const. 7. pr. C. 2. 53; Const. 8. C. 2. 21; Const. 4. C. 2. 20.

⁷ fr. 24. § 4. D. 4. 4; Const. un. pr. C. 2. 48. See fr. 23. § 2; fr. 28. § 6. D. 4. 6; tr. 27. § 1; fr. 40. § 1. D. 4. 4; *Burchardi*, §§ 29. 30.

⁸ fr. 39. § 1. D. 4. 4.

⁹ Const. un. §§ 1. 2. C. 2. 40. See Const. 2. C. 2. 40; Const. 8. C. 2. 22.

6. *Parties to Restitution.*¹

§ 225. The benefit of restitution is not only for the injured party himself, but also for his heirs² and assigns.³ Restitution is granted against a third person possessing a thing when the lost right sought to be restored is a real right.⁴ But in general restitution of an obligatorial relation is only given against those with whom such relation exists.⁵

B. CAUSES FOR PRÆTORIAN RESTITUTION.⁶1. *Because of Force.*⁷

§ 226. When a person had been compelled by unlawful force or by fear that was not groundless to engage in a transaction injurious to himself he was assisted by the civil law only when such transaction produced a *bonæ fidei* action and only against the parties thereto. But if the transaction were only executory he could plead to an action on it without praying for a proper exception;⁸ and if he had partially performed it he could claim damages by an action on it.⁹ The civil law did not protect persons forced in other transactions or against third persons. But the prætor¹⁰ restored to the injured party—

1. The action that arose out of the lost right, and gave it to him as an action *utilis*, as though he had never lost it (§ 222, *supra*). This old action so restored was termed action *rescissoria* or *restitutoria*, and according to the nature of the restored right was either a real or personal action.¹¹ The prætor also enjoined against the renunciation or acceptance of an inheritance.¹²

2. The prætor also gave to the injured party a new special action, namely, the action because of fear (*quod metus causa*),¹³ not only against the party

¹ Burchardi, § 22.

² fr. 6. D. 4. 1; fr. 18. § 5. D. 4. 4. Provided that the estate-leaver has not validly renounced it and that the term for restitution has not yet expired, as the heir enjoys only what remains of the term at the estate-leaver's death: fr. 19. D. 4. 4; Const. un. C. 2. 34; Const. 5. § 1-3. C. 2. 53.

³ fr. 24. pr. D. 4. 4.

⁴ § 5. I. 4. 6; fr. 17. pr. fr. 80. § 1. D. 4. 6; fr. 9. § 4. D. 4. 2.

⁵ fr. 29. § 2. D. 4. 4. But see fr. 9. pr. fr. 13. § 1; fr. 14. 15. D. 4. 4; Const. 1. C. 2. 29.

⁶ Dig. 4. tit. 1-7; Cod. 2. tit. 20-55; fr. 1. 2. D. 4. 1.

⁷ Dig. 4. 2; 44. 4; Cod. 2. 20; Tit. X. 1. 40; *Donellus*, comm. jur. civ. Lib. 15. c. 40; *Glück*, Comm. Vol. 2, § 444; *Burchardi*, §§ 18. 19; *Savigny*, Syst. Vol. 7, § 330.

⁸ fr. 21. D. 24. 3; fr. 84. § 5. D. 30; fr. 68. § 1. D. 18. 1; fr. 3. D. 18. 5.

⁹ As in the case of fraud: fr. 7. pr. § 3; fr. 9. pr. D. 4. 3; fr. 43. § 2; fr. 68. §§ 1. 2. D. 18. 1; fr. 4. pr.; fr. 6. § 9; fr. 12. §§ 4. 5; fr. 30. § 1. D. 19. 1.

¹⁰ Of what nature force (*vis*) and fear (*metus*) must be, so that the legal means subsequently mentioned in the text are applicable, see fr. 1. D. 4. 2; fr. 3. § 1; fr. 7. fr. 8. § 3; fr. 21. § 1; fr. 23. § 2. D. 4. 2; Const. 9. C. 2. 20.

¹¹ fr. 9. § 4-8. D. 4. 2; Const. 3. C. 2. 20.

¹² fr. 21. §§ 5. 6. D. 4. 2.

¹³ fr. 9. §§ 4. 6; fr. 14. § 5. D. 4. 2.

who had employed the unlawful force,¹ but also against a third party, even though innocent, possessing the thing so extorted, as also against those who only mediately participated in the transaction.² This action according to the nature of the coerced transaction proceeded sometimes for the redelivery of the extorted thing with its accessions, sometimes for the restitution of a right relinquished, and sometimes for the dissolution of an obligation undertaken.³ On this action the decree of the judge (*arbitratus judicis*) was given, which when not observed the penalty of four-fold in money was imposed.⁴

3. The injured party according to the circumstances could defend himself with the exception because of fear (*quod metus causa*) against any one who instituted a suit against him founded on the coerced transaction or who sued him by the *vindicatio* for the extorted thing.⁵ The legal remedies mentioned under divisions 2 and 3 above are not properly within the class of *restitutio in integrum*.⁶

2. Because of Fraud.⁷

§ 227. If a person has been misled by fraud into an injurious transaction, the civil law relieves him only when the transaction produces a *bonæ fidei* action, and the party himself with whom he transacted was guilty of the fraud. The remedies are the same as in the cases of force and fear.⁸ The prætorian law relieved him in other cases, though the action *restitutoria* was not given as in force and fear (*vis et metus*), that is, the old lost action was not restored. The party defrauded, however, had the following remedies:

1. On every action founded on the fraud he could obtain restitution by means of the *exceptio* or *replicatio doli*,⁹ to which he was entitled not only against the defrauded, but also against any third party who had acquired the thing of which he had been deprived fraudulently, whether such acquisition was lucrative, or if onerous he was in *malâ fide*.¹⁰

¹ Even if he no longer possesses the thing extorted: fr. 14. § 5. D. 4. 2. The perpetual action was allowed against his heirs to the extent of their enrichment by the act: fr. 16. § 2. D. 4. 2; Const. un. C. 4. 17.

² fr. 14. §§ 3. 5; fr. 9. §§ 6. 8. D. 4. 2. He who has an interest that another shall not be coerced has the action also: fr. 14. §§ 6. 8. D. 4. 2; fr. 7. § 1. D. 44. 1.

³ fr. 9. §§ 3. 5. 7; fr. 12. pr. fr. 14. § 11; fr. 21. § 4. D. 4. 2; Const. 3-5. 7. 12. C. 2. 30.

⁴ fr. 14. §§ 1. 3. 4. 7. 9. 10. 14. D. 4. 2; § 31. I. 4. 6. But this was only when the action was instituted within a year. But at a subsequent period, in consequence of the lack of an action for it, it was extended to the recovery of the simple amount: fr. 14. §§ 1. 2. D. 4. 2; Const. 4. C. 2. 20.

⁵ § 1. I. 4. 13; fr. 9. § 3. D. 4. 2; Const. 5. C. 8. 39; Const. 5. C. 8. 36; fr. 4. § 13. D. 44. 4.

⁶ See § 222, *supra*, at the end.

⁷ Dig. 4. 3; 44. 4; Cod. 2. 21; Glück, Comm. Vol. 5, § 452. See the works cited in the first note to § 388, *infra*, and Burchardi, § 18-20; Savigny, Syst. Vol. 7, § 322.

⁸ See § 226, *supra*, notes 8 and 9.

⁹ fr. 1. pr. § 1. fr. 2. pr. D. 44. 4.

¹⁰ fr. 4. § 27-32. D. 44. 4.

2. But when the defrauded party was not in a position to use the exception or replication *doli*, and had no other legal remedy, the prætor granted him the action *de dolo malo* against the defrauder, and against his heirs, who had been enriched by the fraud,¹ for the restitution of the thing of which he had been deprived fraudulently, with all its accessions; and where this was not possible, or the award of the judge (*arbitratus judicis*) on the action was not obeyed, he had an action for compensation, the amount of which was to be stated, confirmed by his oath, and to be computed by the judge.² This action of *dolo malo* was, however, as an action of infamy (*actio famosa*), subjected by the Roman law to many restrictions,³ and in those cases where it could not be employed, in the absence of any other legal remedy, an action on the case (*actio in factum*) was sometimes allowed.⁴

3. In the course of time,⁵ a proper *restitutio in integrum*, because of *dolus*, was introduced for some cases.⁶

3. Because of Minority.⁷

a. General Principles.

§ 228. Whenever a minor, by which is meant every one who is not full twenty-five years of age,⁸ has suffered an injury either by a transaction which in strict law is binding on him,⁹ or by the omission of an act, he can generally pray for restitution, for the reason that at the time of performing or omitting to perform the act he was a minor.¹⁰ Herein consists the legal benefit of minority, or the rights of minors (*jura minorum*).

¹ fr. 1. pr. § 1. fr. 17. § 1. fr. 26 *seq.* D. 4. 3; § 1. I. 4. 12. But it could not be instituted against a third party possessing the thing: Const. 10. C. 4. 44.

² fr. 18. pr. D. 4. 3; fr. 2. 5. § 3. D. 12. 3.

³ These restrictions related to the limitation of this action (Const. 8. C. 2. 21.), to the persons against whom it might be instituted (fr. 11. § 1. D. 4. 3; Const. 5. C. 2. 21.), and the amount of the damages which might be recovered by it (fr. 9. § 5. fr. 10. D. 4. 3.). See fr. 5. 38. D. 4. 3.

⁴ fr. 11. in fin. fr. 12. fr. 28. fr. 29. D. 4. 3.

⁵ To such cases relate fr. 7. § 1. D. 4. 1; fr. 1. § 6. fr. 7. pr. fr. 38. D. 4. 3.

⁶ Namely, against a valid judgment which was based on false testimony or documents: fr. 33. D. 42. 1; Cod. 7. 58; against one when another applying for restitution has taken the necessary decisory oath demanded by the judge: fr. 31. D. 12. 2; Const. 19. C. 2. 4; against the loss of an action against a third person caused by a fraudulent answer to an *interrogatio in jure*, when the respondent is insolvent: fr. 18. D. 11. 1.

⁷ Gaius, IV. 57. in fin.; Paul, 1. 9; Cod. Theod. 2. 16; Dig. 4. 4; Cod. 2. 22-25; *Donellus*, comm. jur. civ. Lib. 21, c. 6-13; *Glück*, Comm. Vol. 5, § 456; *Burchardi*, § 13-15; *Savigny*, System, Vol. 7, § 322-324. Also, see the works cited on the *Lex Plætoria*, in the first note to § 640, *infra*.

⁸ On the computation of the period of minority, see fr. 3. § 3. D. 4. 4. and § 195, 2.

⁹ See §§ 629, 640, 641, *infra*.

¹⁰ fr. 1. pr. §§ 1. 2. D. 4. 4; Const. 5. pr. C. 2. 22; Const. 2. C. 2. 25; Const. 11. C. 5. 71. The minor is restored even when he caused the injury by his thoughtless-

b. *Parties to the Restitution of Minors.*

§ 229. 1. Generally all minors are entitled to the benefit of restitution with regard to all lawful transactions or omissions by which they have suffered an injury.¹ There are, however, the following exceptions, viz.: when a minor with an evil intent has represented himself to be of age;² when he has been declared to be of age by the proper authority;³ when, after having become of age, he either expressly or tacitly approved of the transaction,⁴ or if pubescent confirmed it by oath;⁵ when the minor gave something which propriety required;⁶ when, after a decree for payment (*decretum de solvendo*), a payment has been made to himself or his guardian;⁷ lastly, there is no restitution because of a wrong by him.⁸

2. The benefit to minors extends to their heirs and assigns, even though these should be of age,⁹ but not in general to a surety who knowingly became responsible for the minor.¹⁰ This benefit extends to a third party when he has an indivisible interest with a minor.¹¹

3. The restitution because of minority may be had against the party with whom the minor concluded the injurious transaction,¹² and against his heirs,¹³ but in general not against a third party possessor of the thing, the object of the transaction,¹⁴ nor against his parents when he contracted with them.¹⁵

c. *Its Effect and Duration.*

§ 230. The effect of this restitution is that everything is restored to its former condition.¹⁶ The minor receives again what he lost, and need only

neat (note 1, p. 186, *supra*), or if it were caused by the wrong of the tutor or curator: fr. 29. pr. fr. 47. D. 4. 4; Const. 3. C. 2. 25; or the act was confirmed by the judge, Const. 2. C. 2. 25; fr. 4. D. 42. 1.

¹ fr. 3. § 4. D. 4. 4; Gaius, IV. 57.

² Const. 1-3. C. 2. 43.

³ Const. 1. C. 2. 45. According to the analogy of this case, the rule is not applicable when a minor has been injured in a business or trade which he was publicly authorized to pursue: *Weber*, von der nat. Verb. § 64, note 7.

⁴ Const. 1. 2. C. 2. 46. See fr. 3. § 2. D. 4. 4.

⁵ Const. 1. Auth. *Sacramenta puberum*, C. 2. 28.

⁶ fr. 9. § 1. D. 4. 4; Const. 1. C. 2. 30.

⁷ Const. 25. C. 5. 37; *Burchardi*, p. 248.

⁸ fr. 9. § 2. D. 4. 4.

⁹ fr. 18. § 5. D. 4. 4; fr. 24. pr. D. 4. 4.

¹⁰ fr. 13. pr. D. 4. 4; fr. 7. § 1. D. 44. 1; Const. 1. 2. C. 2. 24.

¹¹ arg. fr. 10. pr. D. 8. 6; fr. 72. pr. D. 45. 1; fr. 23. 24. D. 4. 4.

¹² Even though they should be entitled to appeal to the senatusconsult *Macedonianum* or *Velleianum*: fr. 3. § 2. D. 14. 6; fr. 11. § 7. fr. 12. D. 4. 4. A minor may also have restitution against the state: fr. 8. D. 4. 1. But if one minor seek restitution from another minor, and the latter would lose by such restitution, then the party who should pay triumphs: fr. 34. pr. D. 4. 4; fr. 11. § 6. D. 4. 4.

¹³ Const. 6. 7. C. 2. 22.

¹⁴ On the exceptions, see fr. 13. § 1. fr. 14. fr. 9. pr. fr. 39. § 1. D. 4. 4.

¹⁵ fr. 24. § 4. D. 4. 4; Const. 2. C. 2. 42.

¹⁶ See § 224, *supra*. If, however, a minor be restored against the entry into an

return the amount that he is still enriched at the time of the *litis contestation*.¹ The minor has the right to *restitutio in integrum* for four years after he has attained his majority.² If, therefore, a minor who might have sought restitution dies without having done so, the remainder of the term descends to his heir, and begins to run, in case this heir is of age, at the time that he enters into the inheritance, and in case he is a minor, on his attaining his majority.³

d. *Its Extension to Other Persons.*

§ 230 a. The *jura minorum*, or the minor's benefit of restitution, is, by the Roman law, only extended to cities.⁴

4. *Because of Absence and other Impediments.*⁵

§ 231. Persons of age may also be restituted on account of absence and other impediments, but only against omissions caused by their absence, and not against lawful transactions which they have entered into and undertaken either personally or by their representatives.⁶

1. The impediments on account of which this restitution is granted are in part specially named in the edict,⁷ to which in general is specially added the clause,⁸ "and the same if any other just cause shall appear to me" ("*item si qua alia mihi justa causa*"). By the express words of the edict the follow-

inheritance, only the legacies, but not the debts paid, may be reclaimed: fr. 5. D. 12. 6; fr. 22. 31. D. 4. 4.

¹ fr. 27. § 1. fr. 47. § 1. D. 4. 4.

² Const. 2. § 2-4. C. Th. 2. 16; Const. 7. C. 2. 53. On the case of coming of age (*venia ætatis*), see Const. 5. pr. C. 2. 53. There is an exception in the case of a *naus heres* (an heir who is in the paternal power), who declines a paternal inheritance, for he is permitted to claim that part of it remaining unsold within three years after the expiration of the *quadrennium restitutionis*, and during that time he also may claim it who first declined it during the *quadriennii* or after its termination. In the latter case the *triennium* begins to run from the moment of declination: Const. 6. C. 6. 31.

³ fr. 18. § 5. fr. 19. D. 4. 4; Const. 2. § 2; 4. C. Th. 2. 16; Const. 5. 7. C. 2. 53.

⁴ fr. 78. § 1. D. 31; Const. 3. C. 11. 29; Const. 1. C. 1. 50; Const. 4. C. 2. 54. The canon law extends it to churches and charitable institutions: Tit. X. 1. 41. Tit. 1. 21. in 6to. The *quadrennium* begins to run from the day that the injury is suffered: Clement. un. de rest. in integr. 1. 11. In practice it is frequently extended to all corporations whose affairs are conducted by directors, and to all persons under curatorship. See *infra*, §§ 637, 638, 643; arg. fr. 1. pr. D. 4. 4; fr. 8. § 1. fr. 11. D. 27. 9; Const. 3. C. 2. 22; Glück, Comm. Vol. 6, § 465; Burchardi, p. 259; Savigny, System, Vol. 7, § 324.

⁵ Dig. 4. 6; Cod. 2. 51. 52. § 4; § 5. l. 4. 6; Glück, Comm. Vol. 6, § 467; Burchardi, § 12; Savigny, System, Vol. 7, § 325-329.

⁶ fr. 7. D. 4. 1; fr. 1. fr. 16. fr. 27. fr. 41. D. 4. 6.

⁷ fr. 1. § 1. D. 4. 6.

⁸ On this general clause, in fr. 1. § 1. D. 4. 6. fr. 26. § 9. D. 4. 6, see Glück, Comm. Vol. 6, §§ 471. 472, and especially Burchardi, pp. 179, 183, 191; Savigny, System, Vol. 7, p. 166, seq., p. 185.

ing may be restored: he who was absent on state affairs,¹ or was absent because of reasonable fear, or was held as a prisoner;² he who could not avert loss because of his opponent's absence, or because he was held as a prisoner, or could not be summoned because of his office, or because he otherwise interposed obstructions,³ or because the proper officer would not give the requisite assistance.⁴ Among the cases in which this restitution is allowed by the foregoing general clause in the Pandects the following should be especially mentioned, viz.: when there was a necessary absence not specified in the edict, or when one during a voluntary absence which was not discreditable, and without carelessness,⁵ or when one by excusable ignorance, omitted a matter;⁶ when the omitted matter was not undertaken because the adversary was a child, a lunatic, or was a corporation and had no representative,⁷ and when the servitude lost by non-user could not have been used because of flood or the like.⁸

2. In the cases above mentioned, where a person is entitled to demand restitution because of absence or other impediments, he can obtain the restoration of his right in different ways according to circumstances; viz., when he has lost a right which he had already acquired, the prætor restores to him the old action arising from this right (action *restitutoria* or *rescissoria*);⁹ when, by his absence, he was prevented from acquiring a right, the prætor grants him the same action, as an action *utilis* (that is, an action based on fictitious circumstances), which he would have had if he had actually acquired the right (action *institutoria*),¹⁰ and when he is in the position as a defendant to make his right available, then an exception is given to him.¹¹

5. *Because of Error.*

§ 232. When one has suffered damages in consequence of an error committed without any fault on his part, and has no other legal remedy for the recovery of what he has thus lost, he may sometimes pray to be reinstated in his former condition.¹² In the sources, however, no other cases of restitution

¹ Without fraud, fr. 1. § 1. fr. 4. 5. pr. D. 4. 6.

² fr. 1. § 1. fr. 2. § 1. fr. 3. 4. 9. 10. 14. D. 4. 6.

³ fr. 1. § 1. fr. 21. § 1. fr. 22. § 2. fr. 23. pr. § 4. fr. 26. § 2. D. 4. 6. But a *procurator* or *defensor* for the opponent must have been lacking. Justinian opened a way by which prescription during the opponent's absence was tolled: Const. 2. C. 7. 40. But he who did not employ this was not debarred from the benefit of restitution.

⁴ fr. 1. § 1. fr. 26. pr. §§ 4. 7. D. 4. 6.

⁵ fr. 26. §§ 1. 9. fr. 28. pr. fr. 40. § 1. D. 4. 6.

⁶ fr. 7. pr. D. 4. 1.

⁷ fr. 22. § 2. D. 4. 6; fr. 124. § 1. D. 50. 17.

⁸ fr. 34. § 1. fr. 35. D. 8. 3; fr. 14. pr. D. 8. 6. Something similar is contained in fr. 1. § 9. D. 43. 19.

⁹ fr. 28. § 5. D. 4. 6; § 5. I. 4. 6.

¹⁰ fr. 17. 41. 43. D. 4. 6; arg. fr. 8. § 14. D. 16. 1.

¹¹ fr. 28. § 5. D. 4. 6.

¹² fr. 2. D. 4. 1; Glück, Comm. Vol. 4, § 296; Burchardi, § 21; Savigny, System, Vol. 7, §§ 320. 331.

for this cause are mentioned than those in which one, through an omission in a transaction before the juridical officer, suffered an unreasonable disadvantage;¹ yet many of these expressions² relate to cases which, with the ancient Roman law of procedure, were obsolete at the time of Justinian, and the only passages of the edict³ respecting such a restitution which have descended to us relate to a special case of the latter kind.

6. *Because of Loss of Status* (capitis deminutio).⁴

§ 233. When one suffered the least loss of status (*minima*⁵ *capitis deminutio*) his debts contracted previously,⁶ with but few exceptions,⁷ according to the civil law⁸ were extinguished. But according to the prætorian law his creditors had their former actions restored to them *in integrum*.⁹ As this is done without judicial investigation (*causæ cognitio*),¹⁰ and also after the expiration of the term for restitution,¹¹ so the result is the same as if the prætor had granted the creditors *utiles* actions without granting *in integrum restitution*.

¹ *E. g.*, fr. 11. § 8–10. D. 11. 1; fr. 11. pr. §§ 1. 2. D. 44. 2; fr. 1. § 17. D. 42. 6. On cases of omission, see *supra*, note 6, p. 193.

² *E. g.*, § 33. I. 4. 6; Gaius, IV. § 123; fr. 2. D. 44. 2; § 10. I. 4. 13.

³ fr. 1. D. 27. 6.

⁴ Dig. 4. 5; Glück, Comm. Vol. 6, § 466; Burchardi, § 17; Savigny, Syst. Vol. 2, p. 82–88; Vol. 7, § 333.

⁵ Respecting the debts of those who suffered a *maxima* or *media capitis deminutio*, see fr. 2. pr. fr. 7. §§ 2. 3. D. 4. 5; fr. 30. D. 44. 7; fr. 47. pr. D. 46. 1; fr. 19. D. 45. 2; fr. 2. 3. D. 48. 23; Const. 4. C. 9. 51; Savigny, Syst. Vol. 2, p. 87.

⁶ The debts contracted subsequently were fully valid already, by the civil law, excepting when anciently the debtor was emancipated. See also fr. 2. § 2. D. 4. 5; Savigny, Syst. Vol. 2, p. 83.

⁷ fr. 2. § 3. D. 4. 5; fr. 21. pr. D. 16. 3; Gaius, III. § 84; Savigny, Syst. Vol. 2, p. 85.

⁸ Gaius, IV. § 38; III. § 84. In general a *naturalis obligatio* (an obligation by the law of nations) continues.

⁹ fr. 2. pr. §§ 1. 2. D. 4. 5; Gaius, IV. § 38. The creditor who arrogates a debtor (adopts one *sui juris*) cannot have restitution: fr. 2. § 4. D. 4. 5. This doctrine is by analogy applied to legitimation.

¹⁰ fr. 2. § 2. D. 4. 5.

¹¹ fr. 2. § 5. D. 4. 5.

HANDBOOK OF THE ROMAN LAW.

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VOLUME SECOND.

SPECIAL PART.

SPECIAL PART.

THE SYSTEM OF THE ROMAN INSTITUTES.¹

§ 234. The system which presents the primary elements of the Roman private law in the Institutes of Gaius and Justinian² is divisible into three principal heads, namely, into the doctrine of persons, things, and actions.³

The first principal head treats of the divisions of persons and relates to their qualification and ability to act,⁴ and in which some of their domestic relations must necessarily be touched on.⁵

The second principal head treats⁶ of the different kinds of things in a legal sense and of the acquisition of corporeal things, or in other words of

¹ Respecting the historical connection between this and the other sections of the private law, see *Leist*, Vers. einer Geschichte der Röm. Rechts-System, Rostock and Schwerin, 1850. He treats of the system of the Institutes in § 16.

² Gaius, I. 8; § 12. I. 1. 2. And also substantially in Ulpian's *liber singularis regularum*, which is composed of his fragments. Respecting a similar arrangement in *Hermogenian's* Epitomæ, which was not without influence on the Pandects, see fr. 2. D. 1. 5. and *Leist*, p. 74. On the arrangement of the Institutes of *Marcianus* and *Florentinus*, *Ibid.* p. 57, *seq.*

³ See § 127, *supra*. Respecting the nature and contents of these three parts there is some conflict of opinion. The terms *jus personarum*, *jus rerum* and *jus actionum* are not Roman: *Savigny*, System, Vol. 1, p. 401, note m.

⁴ There are two principal divisions, with subdivisions:

1. The division into freemen and slaves, with the subdivision of the former into freeborn and manumitted, in which the three former kinds of freeing are treated.

2. The division into persons who are *sui juris* and those who are *aliena juri subiecti*, with the subdivision of the latter into slaves, persons belonging to the family, etc., and with the subdivision of the former into perfect freedom of action and into such as are under tutorship or curatorship. The first principal part is treated on in the first of the four books.

⁵ Before all the various kinds of subjection to another (*alienum jus*), hence in the doctrine of the acquisition of the paternal power (*patria potestas*) something of marriage. and in the doctrine of persons who have not perfect liberty of action something of tutorship and curatorship. In the latter respect Justinian's Institutes extend somewhat farther than those of Gaius. In the doctrine of the freed the *Patronatus* will naturally be treated on: *Savigny*, Syst. Vol. 1, § 59.

⁶ It is the largest; and *Gaius* treats of it in his second and third books, while one book only is given to each of the other two principal parts (the first and fourth). In Justinian's Institutes, where the doctrine of actions is more limited than in Gaius because of the omission of the *legis actiones* and the *formulae*, the last five titles of the second principal part are placed in the fourth book, so that the third principal part begins with L. IV. T. 6.

property in them, as also of the acquisition and so far as it can arise of the loss of incorporeal things, namely, servitudes, inheritances and obligations. Mention will be made of some of the domestic rights, that is, of the influence of the domestic relations on property (estate) and on pawns. The most important of the doctrine of property is included under this principal head.

The third principal head treats of the legal enforcement of the powers of the private law, especially of actions in their narrow sense, of prescriptions, exceptions, replications, duplications, etc., and of interdicts. However, in the last section of the second principal head, namely, in the doctrine of demands for debts, many separate actions, and even some exceptions, are already incidentally mentioned, while under the first principal head, and in the other sections of the second principal head, no mention is made of the juridical enforcement of the legal relations there treated on.

OF THE ORDER THAT WILL BE FOLLOWED.

§ 235. The order of the Institutes which was pursued in the first six editions of this manual in the presentation of the Roman law exhibits many difficulties and inconveniences. These are founded partly in the separation of the practical from the pure domestic law,¹ partly in the separation of actions from the legal circumstances to which they relate, and partly from the position of the law of inheritance.

As the general doctrine of the entire system of law has already been given in the presentation of the special doctrine, it will be more beneficial to pursue the order which *Hugo* first introduced for the Roman law of the present day,² which order he subsequently abandoned,³ but which was reintroduced by *Heise*,⁴ and since then pursued in most of the modern treatises.⁵ Since the rejection of the general doctrine it is substantially as follows:

1. The doctrine of possession and of real rights.⁶
2. The doctrine of demands.
3. The doctrine of domestic relations and their influence on property.
4. The doctrine of successions.

¹ Also because neither the wholly pure nor the wholly practical domestic law has a certain position in the system of the Institutes.

² In the first edition of his Institutes of the present Roman law, Berlin, 1789, see his *Beitrag zur civ. Bücher-kenntnis*, Vol. 1, p. 89-103.

³ In the second edition of his Institutes, etc., of 1799.

⁴ *Heise*, *Grundriss eines systems des gemeinen Civilrechts*, 4th ed. 1824.

⁵ See, also, *Savigny*, *Syst.* Vol. 1, § 58.

⁶ The term *rights of things* as a designation of this doctrine we have avoided, as according to our view of the system of the Roman Institutes it has a greater scope.

FIRST BOOK.

POSSESSION AND REAL RIGHTS.

NATURE OF REAL RIGHTS.

§ 236. A real right is generally that which a person immediately possesses in a thing, by virtue of which the latter is entirely or in certain respects subject to his legal power or will.¹ From the notion or nature of a real right these general principles are deduced :

1. Every real right confers the legal possibility of disposing of the thing, and is thereby substantially distinguished from the mere possession of a thing, which is only the physical possibility of disposal of it. Hence the real right does not depend on the possession of the thing ; it is preserved though the possession be lost.

2. Every real right is in itself an absolute right—that is, he on whom it is immediately conferred exercises such right over the thing against all other persons, and it may exist without regard to any certain person owing duty therefor (§ 15, *supra*). Corresponding to this right is the negative duty of all persons not to hinder him who has the right in its exercise (§ 16, *supra*). This is the essential distinction between real rights and obligations or claims (§§ 15, 16, *supra*).

3. Every real right may be enforced by an action *in rem* against him who is in possession of the thing or against any one who contests his right.²

4. Every real right necessarily ends when the thing perishes to which it relates.³

THE DIFFERENT KINDS OF REAL RIGHTS.

POSSESSION.

§ 237. In the rights to single things, the Roman law distinguishes rights of property (*dominium*) from rights in the thing (*jura in re*). The latter are regarded as detached parts of property, and belong to some other person than him who is the proprietor of the thing.⁴ Hence, the modern jurists term them rights in the thing of another (*jura in re aliena*). Included in these are servitudes, emphyteusis, superficies, and the right of pawn.⁵ Whether in addition to the foregoing the right of inheritance—that is to say, the right

¹ Respecting the nature of real rights, see *Unterholzner*, Verjährung, Vol. 2, p. 161, *seq.* ; *Savigny*, System, Vol. 1, § 56, *seq.*

² § 1. l. 4. 6 ; *Gaius*, IV. 3 ; fr. 25. pr. D. 44. 7.

³ fr. 8. pr. D. 20. 6. See fr. 23. D. 7. 4 ; fr. 14. D. 8. 6.

⁴ *Savigny*, Recht des Besitzes, 6th ed. p. 119, *seq.*

⁵ See the authorities cited in note 1, § 236, *supra*, and note 6, p. 266, *infra* ; *Glück*, Comm. Vol. 2, § 178.

of the heir to an inheritance devolved on him—shall be computed as a real right will be treated on in the fourth book. Possession, on the contrary, abstractly considered, is not a right, but only a state of fact,¹ but under certain conditions has legal consequences, especially that the possessor as such under these conditions is protected in his possession by the judge against unjust attacks.² Hence for this reason the doctrine of possession as a provisional or temporary condition of right is treated in advance of the doctrine of other property and real rights.

CHAPTER I.

POSSESSION.

SOURCES.—Gaius, IV. 138–170; Inst. IV. 15; Dig. XLI. 2. 3. XLIII. 16–23. 26. 31; Cod. Theod. IV. 22. 23; Cod. Just. VII. 32. VIII. 4. 5. 6. 9.

LITERATURE.—*Donellus*, comm. jur. civ. Lib. 5. cap. 6–13; *Cujas*, recitat. ad Dig. et Cod. (in his works T. 8. 9); *Pothier*, traité de la possession, etc., Paris and Orleans, 1772, and new edition, Paris, 1807; *Westphal*, System des Röm. Rechts, Leipzig, 1788; *Thibaut*, über Besitz und Verjährung, Jena, 1803; *Lange*, Phil-jurist. Abhandl. über die Natur des Besitzes, 2 vols., Erlangen, 1813, 1818; *Hufeland*, Neue Darstellung der Rechtslehre vom Besitz, Giessen, 1816; *Savigny*, das Recht des Besitzes, 6th ed. 1837; *Warnkönig*, analyse du traité de la possession par M. De Savigny, Liège, 3d ed. 1827; *Bruno*, das Recht des Besitzes im Mittelalter, und in der Gegenwart, Tübingen, 1848; *Molitor*, la possession, la revendication, la Publicienne, et les Servitudes en droit Romain, avec les rapports entre la législation Romaine en le droit Français, Ghent, 1851; *Lenz*, das Recht des Besitzes, Berlin, 1860.

TITLE FIRST.

OF POSSESSION GENERALLY.

I. OF THE NOTION AND LEGAL NATURE OF POSSESSION.

1. DETENTION.

§ 238. Possession, in its original sense, is naught more than that condition of fact in which a person exercises his power over a corporeal thing at his pleasure, to the exclusion of all others. This physical relation between a person and a thing is termed detention, and it forms the basis of every notion of possession.³

2. LEGAL POSSESSION.

§ 239. To render the mere corporeal relation of detention a legal possession (*possessio*), and thereby a source of rights, the holder of the thing must at the same time have the intention (*animus*) to possess it as his own property.⁴

¹ fr. 1. § 3. D. 41. 2; *Savigny*, Recht des Besitzes, § 2–6.

² fr. 49. pr. D. 41. 2; fr. 49. § 1. D. 41. 2. Possession is not only somewhat corporeal, but has also legal effect ("possessio non tantum corporis, sed et juris est").

³ fr. 1. pr. D. 41. 2.

⁴ Possession and property must not, however, be mistaken for each other. One may have the legal possession of a thing without being its proprietor, and on the contrary, one may be the proprietor without having the possession. Hence it is said,

If, therefore, he merely intends to possess it as the property of another, the Roman law says of him "*non possidet*," that is, he has no legal possession, or "*alieno nomine possidet*," that is, he possesses for another.¹

3. EFFECTS OF LEGAL POSSESSION.

§ 240. Legal possession gives a right to the interdicts, and through usucapion ripens into ownership.²

1. The right to the interdicts presumes the existence of some kind of a legal possession. Hence even the unlawful possessor is generally entitled to invoke the interdicts whenever his possession is forcibly disturbed by others.³

2. Usucapion, on the other hand, presumes the existence of a legal possession; but this is not enough: the possession must also have commenced in a lawful manner and *bona fide*, and the thing possessed must be subject to usucapion.⁴

4. KINDS OF LEGAL POSSESSION.

§ 241. In accordance with the foregoing there are two kinds of legal possession, viz., *possessio ad usucapionem* and *possessio ad interdicta*.⁵ The *possessio ad usucapionem* has a somewhat greater scope than the *possessio ad interdicta*, and always includes the latter,⁶ but the latter never includes the former. It is with reference to this distinction in the legal possession that the Roman jurists employ the particular terms in designating possession in its legal relations to usucapion and interdicts.

1. The *possessio ad usucapionem*, and this alone, is termed by them *possessio civilis*. Of him whose possession is qualified as a basis for usucapion they say *civiliter, jure civili possidet* (to possess by the civil law).⁷ Every

in fr. 12. § 1. D. 41. 2, "Ownership has nothing in common with possession" (*nihil commune habet proprietas cum possessione*); fr. 52. pr. D. 41. 2, "Possession must not be confounded with ownership" (*nec possessio et proprietas misceri debent*); fr. 17. § 1. D. 41. 2. On the nature of the *animus possidendi*, see Savigny, § 9. 23-25.

¹ *E. g.*, in the case of a commodatory, depositary or tenant: fr. 13. pr. fr. 30. § 6. D. 41. 2. See fr. 9. D. 6. 1.

² These consequences of legal possession are termed the *jus possessionis*, or rights arising out of the possession: Savigny, § 2-5. The term *jus possessionis* occurs in fr. 44. pr. D. 41. 2; fr. 2. § 38. D. 43. 8; fr. 5. § 1. D. 48. 6; Const. 5. C. 7. 16. This *jus possessionis* is different from the *jus possidendi*, or the right to the possession of a thing, which always is only the consequence of another right, and hence has no place here, where the possession as an independent self-existing condition is to be regarded as a source of rights.

³ On the disturbance of possession, see fr. 1. § 9. fr. 2. D. 43. 17, and note 3, § 259, *infra*.

⁴ See § 286, *seq.*, *infra*.

⁵ Savigny, §§ 7. and 10.

⁶ Therefore, he who possesses *ad usucapionem* is entitled to the interdicts, unless the latter right for some special reason belongs to another, as in the case of a pawnee: fr. 16. D. 41. 3.

⁷ See fr. 3. § 15. D. 10. 4, with which compare fr. 16. D. 41. 3; fr. 26. pr. D. 24. 1; fr. 1. § 4. D. 41. 2; fr. 1. §§ 9. 10. D. 43. 16.

other kind of possession not qualified for usucapion, whether mere detention or juridical possession, in contradistinction from *civilis possessio*, was termed *naturalis possessio*.

2. The *possessio ad interdicta* by the Roman jurists is termed simply *possessio* when this word is used technically to designate a legal possession, or it is also designated by the verb *possidere*. Every other possession which is not qualified as a basis for edicts, consequently simple detention, is termed *naturalis possessio*.¹ Simple detention is designated by the verbs *tenere*, *corporaliter possidere*, *esse in possessionem*.² -

5. OTHER DIVISIONS OF POSSESSION.

a. *Possessio justa vel injusta*.

§ 242. Respecting the title (*causa possessionis*) by which one possesses or merely retains a thing, possession is either *justa* or *injusta*.³ *Possessio justa* is a possession which was obtained lawfully, whether it be legal possession or mere detention. *Possessio injusta*, on the contrary, is when the possession was obtained unlawfully, as in the case of either of the three vicious possessions (*vitia possessionis*), viz.: when the possession was obtained by force (*vi*), secretly (*clam*), or by request (*precario*).⁴ With respect to the *causa possessionis* this principle applies: "No one can himself change the cause of his possession" (*nemo sibi ipse causam possessionis mutare potest*). This maxim originally referred only to the ancient *usucapio pro herede*, and by it was meant that he who had begun to possess by a particular title could not change his possession voluntarily, and with knowledge of the wrong, into a *possessio pro herede*.⁵ But subsequently it appears that it was understood by the Romans in the sense that he who had the simple detention of another's property could not by his mere will change it into a legal possession,⁶ nor could he who had the legal possession, by his mere will, change it into a usucapion possession.⁷

b. *Possessio bonæ et malæ fidei*.

§ 243. Possession is either *bonæ fidei* or *malæ fidei*.

A possessor *bonæ fidei* is one who believes that no other person has a better right to the possession than himself.⁸

¹ The views respecting *civilis* and *naturalis possessio* are very conflicting. See Savigny, 6th ed. p. 172-178, and p. li.-lxvii.

² § 5. I. 4. 15; fr. 9. D. 6. 1; fr. 7. pr. D. 39. 2; fr. 3. § 3; fr. 10. § 1. fr. 24. fr. 49. § 1. D. 41. 2; fr. 1. § 23. D. 43. 16; fr. 3. § 8. D. 43. 17; fr. 7. D. 43. 26.

³ Savigny, § 8.

⁴ fr. 1. § 9. fr. 2. D. 43. 17.

⁵ Gaius, II. § 52-58. See fr. 33. § 1. D. 41. 3; fr. 2. § 1. D. 41. 5; Const. 2. C. 7. 29; Savigny, § 7. p. 75.

⁶ fr. 3. § 18-20. D. 41. 2; fr. 6. § 3. D. 43. 26.

⁷ fr. 1. § 2. D. 41. 6. See Unterholzner, Verjährungslehre, Vol. 1, §§ 100. 106. 107. and note 6, § 478, *infra*.

⁸ fr. 109. D. 50. 16. See fr. 27. D. 18. 1; fr. 32. § 1. D. 41. 3.

A possessor *malæ fidei* is one who knows that he is not entitled to the possession.¹

6. NATURE OF LEGAL POSSESSION.

a. *Its Object and Subject.*

§ 244. It follows from the notion of legal possession (§ 239, *supra*) that there are certain things which are not susceptible of being possessed, and also that there are certain persons who cannot have legal possession.²

1. Things in which we know there cannot be property cannot be objects of legal possession. Hence all things out of commerce cannot be possessed.³

2. No one can have legal possession who is incapable of holding property, and the same is true as to one who always acquires possession not for himself, but for him in whose power he is, *e. g.*, the slave for his lord, and, by the ancient law, the *filiusfamilias* for his father.⁴

b. *Compossessio.*

§ 245. All possession, from its nature, is exclusive, that is, what is possessed by one cannot at the same time be possessed by another. One and the same thing, therefore, cannot be in the possession of several persons at the same time, so that each of them will possess the whole.⁵ Yet different persons may jointly possess the same thing in certain ideal portions. Modern jurists term this *compossessio*.⁶ Several persons may, however, also possess the same thing in different respects and with different results.⁷

c. *Rights in the Nature of Possession* (juris quasi possessio).

§ 246. Strictly speaking, only corporeal things can be the object of possession, because they only are susceptible of detention.⁸ But as legal possession of a corporeal thing is naught more than an actual exercise of the right of

¹ § 35. I. 2. 1; fr. 38. D. 41. 3; *Savigny*, § 8.

² *Savigny*, § 9. p. 132-137.

³ fr. 30. § 1. D. 41. 2. Therefore a freeman known to be free could not be an object of possession: fr. 23. § 2. fr. 1. § 6. D. 41. 2.

⁴ § 4. I. 2. 9; fr. 24. D. 41. 2. In relation to a *castrense peculium*, however, the *filiusfamilias* may already by the Pandects possess for himself: fr. 49. § 1. D. 41. 2; fr. 4. § 1. D. 41. 3. To what extent, by the Justinian law, he cannot have legal possession, will appear in the doctrine of the *peculia* of the *filiusfamilias*.

⁵ fr. 3. § 5. D. 41. 2. "Plures eandem rem in solidum possidere non possunt. Contra naturam quippe est, ut cum ego aliquid teneam, tu quoque id tenere videaris:" fr. 5. § 15. D. 13. 6; fr. 19. pr. D. 43. 26; *Savigny*, § 11.

⁶ fr. 5. D. 45. 3; fr. 25. § 1. D. 50. 16; fr. 8. D. 6. 1. In this case, therefore, none of them possesses the whole thing, but each only his share. See fr. 3. § 2. D. 41. 3; fr. 32. § 2. D. 41. 3.

⁷ Thus, in the case of pawnor and pawnee, the former possesses *ad usucapionem*, the latter *ad interdicta*: fr. 16. D. 41. 3.

⁸ fr. 3. pr. D. 41. 2; fr. 4. § 27. D. 41. 3; *Savigny*, §§ 12. 44-47.

property in it, so there may be a quasi possession in real rights to another's property¹ (*jura in re*, servitudes) (§ 237, *supra*), namely, the actual exercise of a *jus in re*, undertaken for the purpose of enjoying a right belonging to him who exercises it. This actual exercise of a *jus in re*, combined with that purpose, in the Roman law is termed *juris quasi possessio*, and has the same legal consequences as possession of corporeal things.²

d. *Fictitious Possession* (*ficta possessio*).

§ 247. Sometimes one who is not actually in possession is legally regarded as the possessor.³ This is now termed *ficta possessio*, and it occurs in two cases :

1. In the case of one *qui dolo possidere desiit*, that is, when one has relinquished the possession of a thing with the fraudulent design to obstruct another in pursuing his rights in relation to it.⁴

2. In the case of one *qui liti se obtulit*, that is, when one in an action instituted against him in relation to a thing which he does not possess acted as if he really possessed it.⁵

II. ACQUISITION OF POSSESSION.

1. GENERAL REQUISITES.

§ 248. The acquisition of legal possession always requires—

1. Apprehension of the thing, that is, some physical act (*corpus*) by means of which he who intends to acquire the possession attains such a relation to the thing that he only may subject it to his exclusive control.

2. This apprehension must be accompanied by a certain intention (*animus*) to treat the thing as his own. Whenever both exist, possession is acquired; one without the other will not suffice.⁶

a. *Apprehension* (*corpus*).

§ 249. Apprehension does not absolutely require a manual seizure or touching of the thing, but substantially any corporeal act which gives to him who exercises it the physical ability to exercise his power over the thing whenever he pleases.⁷ Thus apprehension takes place—

¹ At the present day there is a *juris quasi possessio* in certain rights of another kind: *Savigny*, § 49.

² See fr. 3. § 17. D. 43. 16; fr. 23. § 2. D. 4. 6; fr. 10. pr. D. 8. 5.

³ *Glück*, Comm. Vol. 6, p. 62; Vol. 7, p. 525; Vol. 8, p. 205.

⁴ By the *senatusconsultum Juventianum*, this originally applied only to actions for inheritance: fr. 20. § 6. fr. 25. §§ 2. 3. D. 5. 3; but afterwards it was extended to all actions *in rem*: fr. 27. § 8. D. 6. 1; fr. 131. 150. 157. § 1. D. 50. 17. On the consequences, see fr. 25. § 8–10. fr. 45. D. 5. 3; fr. 68. 71. D. 6. 1; fr. 16. § 3. D. 20. 1.

⁵ fr. 25. 26. 27. pr. D. 6. 1. On the consequences, see fr. 13. § 13. D. 5. 3; fr. 5 pr. § 3. D. 12. 3; fr. 7. D. 6. 1; fr. 95. § 9. D. 46. 3; Const. 2. C. 3. 19.

⁶ fr. 3. § 1. D. 41. 2. fr. 3. § 3. fr. 8. D. 41. 2; fr. 153. D. 50. 17; *Savigny*, § 13.

⁷ *Savigny*, §§ 14. 17.

A. With lands, when he who intends to acquire possession of land steps upon it, or only on a part of it, or when he goes near it, or when it is shown to him from a distance by the possessor with a view to deliver it to him.¹

B. With movables,

1. When one seizes the thing with his hands.²
2. When the things come into his traps or nets.³
3. When he watches over them.⁴
4. When they are delivered to another on his order.⁵
5. When they are brought to his house.⁶
6. When the keys of the repository which contains the thing are delivered to him in the vicinity of the enclosure.⁷
7. And when he affixes his mark on the thing, and which thing is no longer in another's possession.⁸ On the contrary, the possession of a wild animal, even though mortally wounded and still pursued, is not acquired till the animal is caught.⁹ This is also true of wild beasts in parks and of fishes in ponds,¹⁰ and likewise of a treasure, which though contained in our land we do not possess till we have found it.¹¹

b. *Intention (animus).*

§ 250. Apprehension alone only produces the detention of the thing.

A. To acquire legal possession it is requisite that the apprehension shall be undertaken by one with the intention to have or possess the thing for himself (*animo rem sibi habendi s. possidendi*) (§ 248, *supra*). The intention to possess (*animus possidendi*) generally consists in the will to treat the thing apprehended as one's own.¹² They therefore who have no will cannot acquire legal possession; such are—

¹ fr. 3. § 1. fr. 18. § 2. D. 41. 2. The legal possession of land which previously was in another's possession cannot be acquired by the mere fact of apprehension, for besides this, it is requisite that the last possessor should have received notice of such apprehension, and then either yielded willingly, fr. 18. § 2. D. 41. 2, or have been forcibly expelled by the other, fr. 25. § 2. fr. 46. D. 41. 2; *Savigny*, § 15. in fin. § 31. See § 254, div. 2, *infra*.

² fr. 1. § 1. D. 46. 2.

³ fr. 55. D. 41. 1.

⁴ fr. 51. D. 41. 2.

⁵ fr. 1. § 21. D. 41. 2; fr. 79. D. 46. 3.

⁶ fr. 18. § 2. D. 41. 2.

⁷ § 45. I. 2. 1; fr. 74. D. 18. 1.

⁸ fr. 14. § 1. D. 18. 6; fr. 1. § 2. D. 18. 6.

⁹ § 13. I. 2. 1. Because many things may intervene that prevent us catching it (*"multa enim accidere possunt, ut eam non capias"*): fr. 5. § 1. D. 41. 1.

¹⁰ fr. 3. §§ 14. 15. D. 41. 2.

¹¹ fr. 3. § 3. D. 41. 2; fr. 15. D. 10. 4.

¹² *Savigny*, §§ 20. 21. This rule has an exception in those cases where the possessor's intention for especial reasons is only directed to the protection of his own possession, consequently to the *jus ad interdicta*, as in the case of the pawnee: fr. 16. D. 41. 3; fr. 35. § 1. fr. 37. D. 13. 7. Such possession is now termed derivative possession. See *Savigny*, § 23-25.

1. All juridical (moral) persons.¹
2. Children (*infantes*), who cannot acquire possession without the authority of their tutor.² Impubescents beyond the age of infancy, however, may acquire possession without such authority.³
3. Madmen and lunatics.⁴

B. But when one capable of will for some reason has already the detention of a thing, so that consequently no further apprehension is necessary, this simple detention becomes changed into legal possession from the moment the intention to possess (*animus possidendi*) takes place in him and joins with the detention. This was termed by the Romans *solo animo possessionem acquirere*. It occurs, however, only when the intention to possess is founded on a *justa causa*, e. g., when the bailor sells or gives a thing to the bailee.⁵ The moderns term it *traditio brevi manu* (§ 284, div. 5, *infra*).

2. ACQUISITION THROUGH REPRESENTATIVES.

§ 251. Possession may be acquired either personally or through a representative.⁶ In the latter case it is necessary—

1. That the representative should apprehend the thing, and with the intention to acquire the possession for his principal and not for himself (*animus non sibi, sed alteri possidendi*).⁷

2. That he for whom the possession is acquired desires to acquire it. Hence the principal does not acquire it when he is ignorant of the apprehension, that is, if he neither commanded, requested nor ratified it (*ignoranti possessio non acquiritur*).⁸

¹ fr. 1. § 15. D. 47. 4; fr. 1. § 22. D. 41. 2. They, however, may acquire possession through representatives: fr. 2. D. 41. 2.

² fr. 32. § 2. D. 41. 2; Const. 3. C. 7. 32. On these two passages see *Savigny*, § 21.

³ fr. 32. pr. § 2. D. 41. 2; fr. 1. § 3. D. 41. 2. It depends on the maturity of the individual according to *Savigny*, *Besitz*, p. 283, and his *System*, Vol. 3, p. 49.

⁴ fr. 1. § 3. fr. 18. § 1. D. 41. 2.

⁵ fr. 9. § 5. D. 41. 1; § 44. I. 2. 1; fr. 9. § 9. D. 12. 1; fr. 3. § 3. D. 41. 2; *Savigny*, § 19. On the case when such *justa causa* is wanting, e. g., when the bailee assumes unilaterally to own the bailment, see note 6, p. 206, and note 2, p. 207, *infra*.

⁶ fr. 42. D. 41. 2; *Savigny*, § 26.

⁷ fr. 1. § 19. D. 41. 2. Possession cannot be acquired through him who has no will: fr. 1. §§ 9. 10. D. 41. 2.

⁸ fr. 42. § 1. fr. 1. §§ 5. 22. fr. 2. fr. 4. fr. 3. § 12. D. 41. 2; fr. 31. § 3. D. 41. 3; fr. 13. § 1. D. 41. 1. But if one has commanded or authorized apprehension it matters not if he be ignorant of its performance. Usucapion begins only from the time when he received knowledge of its fulfillment: fr. 49. § 2. D. 41. 2; fr. 47. D. 41. 3; Const. 1. C. 7. 32. The rule stated in the text and herein more particularly defined does not apply in the following cases:

a. When a juridical person is to acquire possession through his legal representatives: fr. 1. § 22. fr. 2. D. 41. 2.

b. Or a ward through his guardian: fr. 13. § 1. fr. 1. § 20. D. 41. 2.

c. Or when the master or father acquires possession by the slave or *filiusfamilias* taking something in detention belonging to their peculium (*ex peculiali causa*):

3. That between the representative and the principal a legal relation takes place which may be a relation of legal power or that of voluntary representation (note 4, p. 160, *supra*). In the former case the representative acquires possession by virtue of a command (*jussus*);¹ in the latter case by virtue of an authority (*mandatum*).²

3. ACQUISITION OF A RIGHT IN THE NATURE OF POSSESSION (*juris quasi-possessio*).

§ 252. To acquire a *juris quasipossessio* (§ 246, *supra*) both apprehension (*corpus*) and intention (*animus*) are requisite.³ In this case the apprehension is effected by the actual exercise of the right. The intention consists in performing as a right the act which forms the object of the right.⁴ This is more particularly treated of in the doctrine of rights in the thing (*jura in re*).⁵

III. LOSS OF POSSESSION.

1. IN GENERAL.

§ 253. Possession when acquired continues⁶ so long as there is no change in the corporeal relation of the person to the thing (*corpus*) or of the will of the person with respect to the possession,⁷ and such a change must consist of the contrary to that which is necessary to the acquisition of possession⁸ (*in contrarium actum est*). That is, possession may be lost by the lack of *animus* or *corpus*.

2. APPLICATION OF THIS RULE.

a. Loss of Possession through a Corporeal Act.

§ 254. With respect to the first condition of possession, namely, the corporeal relation to the thing, the continuance of possession does not depend on that immediate physical dominion over the thing which is necessary to its acquisition (§ 249, *supra*), but it is sufficient if the possibility exists of reproducing such dominion at pleasure.⁹ Hence the possession of a thing once acquired is not lost by a mere separation from it,¹⁰ and consequently one can exercise detention through the medium of another.¹¹ Possession is lost

fr. 1. § 5. fr. 3. § 12. fr. 4. 24. fr. 32. § 1. in f. fr. 44. § 1. D. 41. 2; fr. 31. § 3. D. 41. 3; *Savigny*, p. 358, 359, 367, 368.

¹ This is the case with slaves and *filii familias*: fr. 1. §§ 5. 6. 8. fr. 49. pr. D. 41. 2; fr. 21. pr. D. 41. 1.

² § 5. l. 2. 9; fr. 2. D. 41. 2; fr. 20. § 2. fr. 53. D. 41. 1; fr. 41. D. 41. 3; Const. l. C. 4. 27.

³ *Savigny*, § 44-47.

⁴ fr. 25. D. 8. 6; fr. 7. D. 43. 19.

⁵ See *Servitudes*, chap. 3, *infra*.

⁶ *Savigny*, §§ 29. 30.

⁷ fr. 44. § 2. fr. 3. §§ 6. 13. D. 41. 2.

⁸ This is the sense of the passages which appear twice in fr. 8. D. 41. 2. and fr. 153. D. 50. 17; *Savigny*, § 30.

⁹ *Savigny*, § 31.

¹⁰ Paul, sent. rec. V. 2. 1; fr. 3. §§ 7. 13. fr. 44. pr. D. 41. 2; fr. 1. § 25. D. 43. 16.

¹¹ fr. 18. pr. D. 41. 2. See § 239, *supra*.

when some act of the possessor has made it impossible for him to exert physical power over the thing (*si in contrarium actum est*). Such is the case¹—

1. With movable things when another obtains possession of them, whether by force or secretly,² when we lose them,³ when domestic animals stray away from us, when wild animals escape from our custody, and when animals which have been tamed abandon their habit of returning to us.⁴

2. With an immovable thing when the possessor has been deprived of dominion over it by a natural event,⁵ or when he has been ejected from the possession by another (*si deicitur*). If another has taken possession of our land during our absence, and without our knowledge, our possession is not lost till he has repelled us in our efforts to regain it; but if with our knowledge, it is lost if we make no effort to regain it.⁶

b. *Loss of Possession through Intention (animus).*

§ 255. With respect to intention, the second condition of the continuation of possession, it is not necessary that the possessor should be conscious of it at every moment; for the possession is not lost by intention till he positively determines to lose it (*si in contrarium actum est*).⁷ Hence, he who has no will cannot lose his possession by intention.⁸ Possession is lost by mere intention in the cases of the *traditio brevi manu* mentioned above (§ 250), as also in the cases when a possessor agrees with another that a thing which he possesses in his own name shall thereafter be possessed by him in the other's name and as his representative.⁹

c. *Loss of Possession through both Act (corpus) and Intention (animus).*

§ 256. Possession is lost through a corporeal act, and intention combined, when the possessor delivers a thing to another so that it shall be this other's own,¹⁰ or when he abandons it.¹¹

LOSS THROUGH REPRESENTATIVES.

§ 257. As possession may be acquired through a representative, so, too, it may be continued or lost through one.¹² Thus—

¹ The following cases are excepted from this principle, viz.: when the possessor dies or becomes incapable of holding property: fr. 30. § 3. D. 41. 2. When the object of possession is destroyed or ceases to be the object of commerce (*extra commercium*): fr. 30. cit. §§ 3. 4.

² fr. 15. D. 41. 2.

³ fr. 25. pr. D. 41. 2.

⁴ fr. 3. § 13–16. D. 41. 2.

⁵ fr. 3. § 17. fr. 30. § 3. D. 41. 2.

⁶ fr. 3. § 8. fr. 6. § 1. fr. 7. fr. 25. § 2. fr. 46. D. 41. 2. See note 1, p. 205.

⁷ fr. 3. § 6. fr. 17. § 1. fr. 30. § 4. D. 41. 2; *Savigny*, § 32.

⁸ fr. 27. 29. D. 41. 2.

⁹ Thus, when in the sale of a thing it is agreed that the vendor shall hold it as a bailee: fr. 18. pr. D. 41. 2; fr. 77. D. 6. 1; Const. 28. C. 8. 54; *Savigny*, § 27.

¹⁰ fr. 33. fr. 18. § 2. D. 41. 2.

¹¹ § 47. I. 2. 1.

¹² *Savigny*, § 33.

1. Possession may be lost to the representative himself; to effect this a mere change of his intention is not sufficient, but there must be in addition either the assent of the possessor (*traditio brevi manu*, § 250, *supra*) or a corporeal act by the representative, which in the case of movables consists in fraudulently appropriating them (*furtum, contrectatio*),¹ and in the case of immovables in dispossessing the possessor.²

2. Possession may be lost through a representative. This takes place in all cases where the possessor himself would have lost his possession even if there had been no representation, and thus especially,

a. With respect to movable things, when the representative loses them, or when he has been deprived of them,³ or when he delivers them to another.⁴

b. With respect to immovable things, when he is dispossessed by force, in which case the possession of the principal is immediately lost;⁵ but when either through negligence (*desidia*) or an evil intent (*dolo*), he merely permits a third person to take possession of the thing, this will not prejudice the principal till he has been repelled by the third party in his attempt to regain the thing, or unless he does not even dare to attempt it.⁶

3. On the other hand, possession is not lost through a representative when he confers on another merely the detention of a thing,⁷ when he dies or becomes insane,⁸ and when he merely leaves the thing without another's taking possession of it.⁹

4. Possession is preserved by the representative where he retains the detention of the thing, even though the principal himself may have been ejected.¹⁰

TITLE SECOND.

OF POSSESSORY INTERDICTS.

1. *Nature of Interdicts.*

§ 258. Interdicts among the Romans were decrees of the prætor by means of which in certain cases determined by the edict he himself directly com-

¹ fr. 3. § 18. D. 41. 2. See fr. 1. § 2. fr. 67. pr. D. 47. 2. There is an exceptional case when the representative who in this manner endeavors to assume the possession for himself comes into the power of the possessor: fr. 15. D. 41. 2.

² Because of fr. 25. § 2. fr. 46. D. 41. 2 (see *supra*, § 254, note 9), fr. 12. fr. 18. pr. D. 43. 16.

³ fr. 25. pr. fr. 15. fr. 3. § 13-16. D. 41. 2.

⁴ fr. 33. § 4. D. 41. 3.

⁵ fr. 1. § 22. D. 43. 16.

⁶ Const. 12. C. 7. 32, which should be understood as relating only to immovables, partly because of fr. 3. § 8. D. 41. 2, partly because of fr. 33. § 4. D. 41. 3, and partly because of the words "*sive servus, sive procurator, vel colonus, vel inquilinus*," and in consequence of which the general principle "*donec revertentes nos aliquis repellat*" is to be applied.

⁷ fr. 30. § 6. D. 41. 2.

⁸ fr. 25. § 1. D. 41. 2; fr. 31. § 3. D. 41. 3.

⁹ fr. 3. § 8. fr. 44. § 2. D. 41. 2.

¹⁰ fr. 1. § 45. D. 43. 16.

manded what should be done or omitted. The term *interdictum*, however, was given also to the application made to obtain the issuing of such a decree.¹ Interdicts are distinguished from actions properly so called chiefly by the fact that in the latter the prætor did not in general proceed and decide himself on the action brought, but appointed a judge (*judicem dabat*) and gave him directions for the investigation of the matter; while in interdicts, immediately upon the request of the plaintiff alone and without previously appointing a judge (*extra ordinem*), he issued the command or prohibition which he had already announced in the edict for like cases. Hence it was said in such cases that the prætor especially exercised his authority to end the controversy (*prætor principaliter auctoritatem suam finiendis controversiis proponit*).² It was not till the defendant denied the plaintiff's allegations or opposed his exceptions to the plaint that a judge was appointed, and then the matter took the usual course of procedure in actions.³ This difference between actions and interdicts necessarily ceased with the ancient *ordo judiciorum privatorum*. Hence in the modern Roman law interdicts are regarded precisely the same as actions, though they gave rise to a summary proceeding.⁴

I. POSSESSORY INTERDICTS IN GENERAL.

§ 258 *a*. Many prohibitory and restoring interdicts⁵ relate to possession, and hence are termed possessory interdicts. These are,⁶

1. Either such as are especially adapted to the protection of a possession which is merely disturbed, but not entirely lost, interdicts for the retention of possession (*interdicta retinendæ possessionis*), or for the recovery of a lost possession, interdicts for the recovery of possession (*interdicta recuperandæ possessionis*);⁷

2. Or are such as are adapted to the acquisition of a possession⁸ (*interdicta adipiscendæ possessionis*).

¹ Gaius, IV. 138-170; Inst. IV. 15; Dig. 43; Cod. Theod. 4. 22. 23; Cod. Just. 8. 1-9; Donellus, Comm. jur. civ. XV. 32-38; Savigny, Besitz, chap. 4.

² Gaius, IV. 130.

³ Gaius, IV. 141.

⁴ § 8. I. 4. 15; Rubr. D. 43. 1; Const. 3. C. 8. 1.

⁵ See note 3, *seq.*, p. 171. The interdicts *retinendæ possessionis* belong to the prohibitory interdicts; the interdicts *recuperandæ possessionis* to the restoring; the interdicts *adipiscendæ possessionis* are principally restoring and but rarely prohibitory. (But see fr. 2. § 3. D. 43. 1.)

⁶ § 2. I. 4. 15; fr. 2. § 3. D. 43. 1; Gaius, IV. 143, *seq.*

⁷ The term *possessio ad interdicta* refers only to these two kinds of interdicts (§§ 240, 241, *supra*), for they are only to be considered as juridical effects of possession. Hence by way of distinction they are termed possessory interdicts. Accordingly they only belong here when we speak of the protection of an acquired possession, while the interdicts *adipiscendæ possessionis* must always be treated of under those heads to which they properly belong. See §§ 357, 748, 769, *infra*.

⁸ § 3. I. 4. 15; Gaius, IV. § 144-147; Savigny, § 35.

II. POSSESSORY INTERDICTS ESPECIALLY.

A. INTERDICTS FOR THE RETENTION OF POSSESSION (*interdicta retinendæ possessionis*).¹1. *Requisites*.²

§ 259. To be entitled to these interdicts, or rather to the actions corresponding to them, it is requisite—

1. That legal possession be actually acquired. It is immaterial whether there is a right to possess or whether the possession was acquired lawfully.³

2. That the possession was forcibly violated.⁴ By force is here meant every act done contrary to the will of the possessor.⁵

3. That the possession was not lost again; for if that be the case then the interdict *recuperandæ possessionis* should be employed.

2. *Kinds of Interdicts for the Retention of Possession.*

§ 260. Subject to the foregoing provisions the following kinds of interdicts are employed for the protection of the possession:⁶ the interdict *uti possidetis*, or rather the action out of it with respect to immovables, and the interdict *utrubi*, with respect to movables.⁷ In regard to the latter it formerly depended on whether legal possession was held for the greater part of the last year.⁸ But by the Justinian law the interdict *utrubi* is subject to the same rules as the former.⁹ When both of these, when other similar inter-

¹ *Savigny*, § 37; *Theodori*, über das Interdict des Röm. Rechts zur Erhaltung des Besitzes, Munich, 1858. See also note 3, p. 171, note 2, p. 173, *supra*, § 260, note 6, and § 262, note 3, *infra*.

² The Justinian law, which it is sought primarily to state here, no longer treats of interdicts as being actually used, but only of actions which were allowed as if they had been preceded by interdicts as a prerequisite. See *supra*, note 2, p. 173, and especially § 8. I. 14. 15. "Respecting the procedure and the former result of interdicts it is superfluous now to speak; because as soon as the decree is made in the extraordinary jurisdiction, as at present all the judgments are, it is unnecessary to grant an interdict: the decree is made without an interdict, as if on the basis of it an analogous action had been given:" *Schmidt*, Interdictverf. p. 284, *seq.*

³ fr. 2. D. 43. 17. See § 4. in fin. I. 4. 15; *Gaius*, IV. §§ 148. 150; fr. 1. § 9. fr. 3. § 10. D. 43. 17; fr. 53. D. 41. 2.

⁴ This was not a prerequisite to the interdict, but a prerequisite to the action *utilis ex interdicto*. See fr. 1. pr. D. 43. 17; fr. 1. D. 43. 31. and note 2, *supra*.

⁵ fr. 1. § 5-7. D. 43. 24; fr. 20. pr. § 1. D. *ibid.*; fr. 73. § 2. D. 50. 17. There are examples in fr. 3. § 2-4. D. 43. 17; fr. 11. D. 43. 16.

⁶ § 4. I. 4. 15; Dig. 43. 17; Cod. 8. 6; *Savigny*, § 38; *Wiederhold*, das interd. *Uti possidetis*, etc., Hanau, 1831.

⁷ § 4. I. 4. 15; Dig. 48. 31; *Savigny*, § 39.

⁸ Without, however, having obtained the possession from the present antagonist forcibly, secretly or by request: § 4. I. 4. 15.

⁹ § 4. I. 4. 15; fr. 1. § 1. D. 43. 31.

dicts and when by the Justinian law the requisite actions for the protection of a *quasi possessio* are employed will be treated of under the head of servitudes.

3. Duplicity of the Interdicts.

§ 261. The interdicts mentioned in § 260, *supra*, were *interdicta duplicia* (§ 206, note 5, *supra*),¹ and the corresponding actions which the Justinian law permits are actions *duplices*.² The result of the action does not depend on which of the parties invokes the interdict, or, according to the modern law, who institutes the action, but it is considered as if each party had instituted a cross action against the other. Hence either the plaintiff or the defendant may be condemned.

4. Object of the Interdicts.

§ 262. The object of the action which may be enforced by the Justinian law,³ as if the interdict *uti possidetis* or *utrubi* had been given, is for the acknowledgment of the possession and the condemnation of the antagonist for compensation for damages for the disturbance of the possession.⁴

B. INTERDICTS FOR THE RECOVERY OF POSSESSION (*interdicta recuperandæ possessionis*).

1. Interdict *unde vi*.⁵

§ 263. He who has been forcibly dispossessed of an immovable thing may reclaim it by means of the interdict *unde vi*.⁶ This interdict and the corresponding action by the modern law presumes that the complainant has actually acquired legal possession,⁷ and that he was deprived of it by another unlawfully and with force against his person.⁸ This interdict⁹ may—

1. Be instituted by the party who had legal possession of the thing, and by his heirs.¹⁰

¹ fr. 2. pr. D. 43. 1; fr. 3. § 1. D. 43. 17; fr. 37. § 1. D. 44. 7; § 7. I. 4. 15.

² § 7. I. 4. 15.

³ On the object of the interdicts in question, see *Savigny*, § 37–39.

⁴ fr. 1. pr. fr. 3. § 11. D. 43. 17. To obtain full compensation for damages the action must be instituted within a year from the time of the disturbance: fr. 1. pr. D. 43. 17. comp. with fr. 4. D. 43. 1.

⁵ Cicero, pro Cæcina; Gaius, IV. 154; § 6. I. 4. 15; Dig. 43. 16; Cod. 8. tit. 4. 5; *Savigny*, § 40.

⁶ fr. 1. § 3–6. D. 43. 16. See the fourth note to § 485, *infra*.

⁷ fr. 1. §§ 9. 23. D. 43. 16. In this connection it is immaterial whether the ejected person had acquired the possession forcibly, secretly or by request from the party who had forcibly ejected him. By the ancient law this was a characteristic of the interdict *de vi armata*; by the modern law it also occurs with the interdict *de vi quotidiana*. Compare Gaius, §§ 154. 155, with § 6. I. 4. 15. (§ 259, note 3, *supra*).

⁸ fr. 1. §§ 3. 21. 29. fr. 3. §§ 6. 7. D. 43. 16; fr. 9. pr. D. 4. 2.

⁹ fr. 3. § 13–16. D. 43. 16; fr. 9. § 1. D. 43. 16; fr. 60. pr. D. 7. 1; fr. 27. D. 39. 5; fr. 4. § 27. D. 41. 3.

¹⁰ fr. 1. §§ 30. 44. D. 43. 16.

2. It takes place against him who is the immediate or mediate originator of the ejection,¹ and against his heirs so far as they have been enriched by it,² but not against the third party possessor of the thing.³

3. Its design is to restore the party ejected (*dejectus*) to the position he occupied before the ejection, and compensation for damages.⁴

4. The right to it is lost after the lapse of a year from the time of the ejection; after this time it can be instituted against the ejector only for the amount that he has been enriched by the ejection.⁵

2. *Interdict of Secret Possession* (de clandestina possessione), and 3. *Interdict of Request* (de precario).

§ 264. The doubtful interdict *clandestina possessione* rests substantially on the same principles as the interdict *de precario*. The former was employed in the case where one had been secretly deprived of the possession of an immovable thing.⁶ This interdict no longer exists in the modern law.⁷ The latter applies to the case where one has granted to another, at his request (*precario*), the use of a thing or the enjoyment of a servitude, and the latter refuses to return the thing or to abstain from the enjoyment of the servitude on the demand of the grantor.⁸

CHAPTER II.

OF PROPERTY.

SOURCES, for the ancient law especially, Gaius, II. § 1-97; Ulpian, tit. 19. For the modern law, Inst. II. 1; Dig. XLI. 1; Cod. VII. 25.

LITERATURE, on the ancient law, *Hugo*, Rechtsgeschichte, p. 191-231, p. 509-537, p. 922-925; *Gans*, Scholien zu Gaius, 5te Scholie; *Pütter*, die Lehre vom Eigenthume, Berlin, 1831, p. 76-126; *Giraud*, Recherches sur le droit de propriété, chez les Romains, Vol. 1, Aix, 1838. On the modern law, *Donellus*, Comm. jur. civ. Lib. 9. c. 8-12; *Westphal*, System des Röm. Rechts, Frankfurt and Leipzig, 1791; *Gesterding*, Ausführliche Darstellung der Lehre vom Eigenthum, Greifswald, 1817; *Sell*, Röm. Lehre des Eigenthums, 2d ed., Bonn, 1852; *Pagenstecher*, die Röm. Lehre vom Eigenthum, 3d part, Heidelberg, 1857-1859.

¹ fr. 1. §§ 12. 15. fr. 3. § 10-12. D. 43. 16.

² fr. 1. § 48. fr. 3. pr. fr. 9. pr. D. 43. 16. Only an action *in factum* was instituted against persons to whom reverence was due: fr. 1. § 43. D. 43. 16.

³ fr. 3. § 10. D. 43. 17. By the canon law it may be instituted against the third party *malæ fide possessor*: cap. 18. X. 2. 13.

⁴ fr. 1. § 31. D. 43. 16. See fr. 1. §§ 41. 42. fr. 6. D. 43. 16.

⁵ fr. 1. pr. D. 43. 16.

⁶ fr. 7. § 5. D. 10. 3; *Savigny*, § 41.

⁷ For the reason, see § 249, note 2, § 254, note 9, *supra*.

⁸ Dig. 43. 26. Especially fr. 2-4. fr. 15. § 2; Const. 2. C. 8. 9; *Savigny*, § 42; *Bulling*, das Precarium, Leipzig, 1846.

TITLE FIRST.

OF THE NOTION AND NATURE OF PROPERTY.

I. NOTION OF PROPERTY.

§ 265. Property in its wide sense signifies everything which belongs to our wealth—all that is our own, be it corporeal or incorporeal.¹ The ownership of corporeal things denotes property in its narrow sense (*dominium*).² Ownership therefore consists, according to its nature and essence, in the property of a corporeal thing—that is, in that the thing itself belongs to us, is our own.³ Property in its nature is an unrestricted and exclusive right. Hence it comprises in itself the right to dispose of the substance of the thing in every legal way, to possess it, to use it, and to exclude every other person from interfering with it.

II. UNLIMITED AND LIMITED PROPERTY.

§ 266. Property in its nature is an unlimited and exclusive right. It may, however, be restricted in either of these respects without the owner ceasing to be owner.⁴ When the owner possesses all the rights inherent in property, and his free exercise of them is unobstructed by any right of another in the same thing, it is a full and free property, *proprietas plena* (*dominium plenum*). But on the contrary, when the whole right of using the thing is separated from the ownership and pertains to another as a real right, the right remaining in the owner is termed naked property, *nuda proprietas* (*dominium minus plenum*).⁵ Property may also be restricted by various other rights in the thing (*jura in re*) belonging to others than the owner. In cases of this kind it is limited or burdened property.

III. REVOCABLE PROPERTY.

§ 267. Property in consequence of a particular condition may be restricted in its duration. This is especially the case⁶ when it has been acquired under

¹ fr. 49. D. 50. 16. The Roman law sometimes speaks in this wide sense of a *dominio ususfructus, servitutis et hereditatis*: fr. 3. D. 7. 6; fr. 8. pr. D. 42. 5; § 7. I. 2. 19; fr. 48. pr. D. 28. 5, and also of a *vindicatio servitutis, pignoris, successionis*: fr. 9. D. 39. 1; fr. 16. § 3. D. 20. 1; Const. 4. C. 6. 9. See fr. 25. pr. D. 44. 7.

² Hence owner of the thing (*corporis dominus*), in contradistinction from him who has only a right in the thing (*jus in re*); fr. 13. § 1. D. 39. 2. See Glück, Comm. Vol. 8, § 576.

³ fr. 13. pr. D. 41. 1; fr. 1. § 1. D. 29. 5.

⁴ fr. 25. pr. D. 50. 16.

⁵ fr. 4. D. 23. 3; fr. 126. § 1. D. 45. 1; fr. 2. pr. fr. 17. D. 7. 4; § 4. I. 2. 4. The one who possesses the mere right of ownership is termed owner of the property (*dominus proprietatis*) in contradistinction from him who has the right to its use (*ususfructuarius*): fr. 15. § 6. fr. 72. D. 7. 1; fr. 9. pr. § 4. D. 7. 9; fr. 66. D. 23. 3; fr. 57. D. 24. 3; fr. 33. D. 6. 1.

⁶ A parallel case with this is when one as heir acquires a thing which was

a resolute (subsequent) condition, which stipulated that on the happening of it the property should revert in the former owner without any act of transfer,¹ so that such owner shall have an action *in rem* against every possessor of the thing, and every intermediate alienation made by the temporary owners, and also the *jura in re* with which the thing was burdened by them cease of themselves (*resoluto jure concedentis resolvitur jus concessum*).² Such a case should not be confounded with that in which the owner, though it was the condition on which his right was acquired, is obliged to transfer the property to another, even if that other be the former owner, from whom he acquired it.³ In this case there can only be a personal action against the grantee, and the lawful alienations made in the intermediate period, especially the burdening of the thing with *jura in re*, remain valid. At the present day the term *dominium revocabile*, revocable property, is used for both classes of cases, but the property in cases of the first class is termed revocable property from then (*dominium revocabile ex tunc*), and in cases of the second class revocable property from now (*dominium revocabile ex nunc*).

IV. JOINT PROPERTY.

§ 268. Property in its nature is an absolute, exclusive right, that is, that which belongs to one cannot at the same time belong to another. Therefore, the property in one and the same thing can never be in more than one at the same time, and it cannot be conceived that each of several could be the owner of the whole thing.⁴ Yet a thing may be the common property of several in such a manner that each has an ideal share in it.⁵ In such case none of them is the owner of the whole thing; each is owner of his ideal part only, but this he owns exclusively. Modern jurists term this joint property, or *condominium*.

TITLE SECOND.

ACQUISITION OF PROPERTY.⁶

I. GENERAL REQUISITES FOR ACQUISITION.

§ 269. The acquisition of property requires—

1. A person capable of acquiring. In general every one is incapable of acquiring property (such as the demented) who cannot possess property,⁷ granted to another on a suspensive condition: Const. 3. C. 6. 43; fr. 11. § 1. D. 8. 6.

¹ fr. 41. pr. D. 6. 1; fr. 4. § 3. D. 18. 2; fr. 2. § 4. 5. D. 41. 4; Const. 1. 4. C. 4. 54; Glück, Comm. Vol. 16, tit. 2. 3.

² E. g., fr. 3. D. 20. 6; fr. 4. § 3. D. 18. 2.

³ E. g., Const. 8. 10. C. 8. 56.

⁴ fr. 5. § 15. D. 13. 6; fr. 3. § 5. D. 41. 2. See § 245, *supra*.

⁵ fr. 4. § 7. D. 10. 1; fr. 8. D. 6. 1; fr. 5. D. 45. 3; fr. 25. § 1. D. 50. 16.

⁶ Inst. 2. 1; Dig. 41. 1; Donellus, comm. jur. civ. Lib. 4. c. 7-37, Lib. 5. c. 1-31.

⁷ He who has no will, such as a demented person, is only excluded from those

But they who cannot acquire anything for themselves (such as slaves), but only for others, may acquire property for such others.¹

2. A thing in which property can be acquired, and by him who desires to acquire it.²

3. A lawful mode of acquisition (*acquisitio, species s. genus acquisitionis, causa acquirendi*). This is either an acquisition of the entirety (*per universitatem*), when the property in things is so acquired that one enters into an entire succession or estate (universal succession) to which such things belong, or acquisition of single things (*singularum rerum*), when the property to single things, as such, is acquired.³ Both modes of acquisition are founded partly on the civil and partly on the prætorian law. The acquisitions of single things founded on the civil law are either acquisitions by the law of nations or acquisitions by the civil law, according as they rest on the legal principles of the civilized nations of antiquity, on which they are founded, or rest on the provisions of the Roman law.⁴ This distinction still exists in the Justinian law.⁵ Care must be had⁶ to distinguish between modes of acquiring the *dominium* according to the ancient Roman law *ex jure Quiritium*, and between those which at that time were only acquired according to the law of nations (*in bonis esse*). Justinian gave the latter the same effect as the former.⁷ The acquisitions by entirety⁸ cannot be treated of here, and of the acquisitions of single things, those only which now admit of a full explanation will be considered.⁹

II. MODES OF ACQUISITION.

A. OCCUPATION.

§ 270. Occupancy is that mode of acquiring property which is founded on the principle *res nullius cedit occupanti*, i. e., he who takes possession of an modes of acquisition that depend on the act of him who acquires. See § 3. I. 3. 1; fr. 63. D. 29. 2.

¹ Inst. 2. 9. See § 196, *supra*.

² § 7. I. 2. 1; fr. 6. § 2. D. 1. 8; § 4. I. 2. 20; fr. 49. § 2. D. 31; Const. 1. 2. C. 1. 10.

³ § 6. I. 2. 9.

⁴ Gaius, II. § 18, *seq.*; Ulpian, XIX.

⁵ § 11. I. 2. 1; fr. 1. pr. D. 41. 1.

⁶ In which are included all prætorian modes of acquisition, and the *translatio rerum Mancipi*.

⁷ Const. un. C. 7. 25.

⁸ To this head belong, according to the older law especially, the acquisition by arrogation (§ 596, *infra*), *per conventionem uxoris in manum mariti*, *per emtionem bonorum debitoris obærat* (§ 521, *infra*), *per hereditatem et bonorum possessionem*, and some others. See Gaius, II. 98; III. 77, *seq.*; Inst. 3. 10–12 (11–13). The acquisition by inheritance is the only one of all these that is retained in the modern law, § 6. I. 2. 9; this will be treated of in the fourth book.

⁹ Such as the acquisition of property through legacies (§ 760, *seq.*, *infra*), and many other cases in which property is directly acquired by law (*ipso jure, lege*), as by a second marriage, or a divorce for cause (§ 579–582, *infra*).

ownerless thing, with the design of appropriating it to himself, thereby becomes the owner of it.¹ By the Roman law there are three kinds of occupancy, viz.:

1. The occupancy of ownerless living things, in which are included all wild animals that live on the earth, in the waters, or in the air, provided that they are still in their natural state of freedom, and have not yet been caught, or if they had been caught, have regained their natural freedom. This kind of occupancy, therefore, comprises hunting, fishing and fowling.²

2. The occupancy of ownerless inanimate things, or finding;³ however, neither the treasure found,⁴ nor things lost or jettisoned, are regarded as ownerless.⁵

3. The capture of war, as the Roman law regards enemy's goods as ownerless, and hence permits the occupancy of them.⁶ Yet here a return to former ownership (*postliminium*) often occurs,⁷ but only of recaptured immovables and some kinds of movables.⁸ By the modern German law all these three kinds of occupancy are much more restricted.

B. SPECIFICATION.

§ 271. Specification is that mode of acquisition through which a person by transforming a thing belonging to another, especially by elaborating his material into a new species, becomes the owner of it.⁹ When he who produces the new species has made it partly out of his own and partly out of another's material, then he always acquires the ownership of it;¹⁰ but if, on the contrary, he has formed the new species out of another's material alone, it depends on whether it is or is not possible to restore it to its former condition.¹¹ In the former case the owner of the material becomes also the owner of the new species, but then he must compensate the specifier for his labor if he acted

¹ fr. 3. D. 41. 1. "Quod nullius est, id ratione naturali occupanti conceditur." Gaius, II. 66-69; § 12-18. I. 2. 1; *Gesterding*, vom Eigenthume, § 13-19; *Brower*, de jure occupandi, Leyden, 1822.

² §§ 12. 16. I. 2. 1. "Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno;" fr. 1. § 1. fr. 2-6. D. 41. 1; fr. 1. § 1. D. 41. 2.

³ §§ 18. 47. I. 2. 1; fr. 1. § 1. D. 41. 2.

⁴ The finder is entitled to one half, provided that he did not seek for the treasure. The owner of the soil in which it was found is entitled to the other half. If the finder sought for it, or the owner himself found it, then such owner is entitled to the whole of it: § 39. I. 2. 1; fr. 3. § 10. D. 49. 14. See Gaius, II. § 7. The latest ordinance on the finding of treasure is Const. un. C. 10. 15.

⁵ § 48. I. 2. 1; Dig. 41. 7.

⁶ § 17. I. 2. 1; fr. 5. § 7. fr. 51. § 1. D. 41. 1.

⁷ Dig. 49. 15; Cod. 8. 51.

⁸ Namely, in the case of slaves, war vessels, transports, war horses and beasts of burden: fr. 2. 3. fr. 20. § 1. fr. 28. D. 49. 15. See § 132, note 10, p. 123, *supra*.

⁹ The word *specificatio* is not Roman; they used the phrase *speciem facere*.

¹⁰ § 25. in f. I. 2. 1. This, however, is doubtful, because especially of fr. 5. § 1. D. 6. 1. fr. 12. § 1. D. 41. 1.

¹¹ § 25. I. 2. 1. comp. with fr. 7. § 7. fr. 12. § 1. fr. 24. fr. 26. pr. D. 41. 1; Gaius, II. § 79.

bona fide.¹ In the latter case the specifier becomes the owner of the new species,² provided that he had intended to elaborate it for himself,³ for in this case with respect to the acquisition of property it matters not whether he acted *bona* or *mala fide*.⁴ But as respects the compensation of the former owner of the material the specifier, if he acted *bona fide*, must compensate for the loss only to the extent that he has been enriched by it;⁵ if, on the contrary, he acted *mala fide*, like a thief, he is liable to fully compensate for damages.⁶

C. ACCESSION.

§ 272. Accession is that mode of acquisition whereby, according to the rule that the accessory follows the principal (*res accessoria sequitur rem principalem* or *cedit rei principali*), the owner of the principal thing of right becomes also the owner of all that which accrues to it as an accessory thing.⁷ This mode of acquisition comprises many cases which are reduced to simple divisions in § 273–279, *infra*.⁸

1. Acquisition of the Productions of Things.

§ 273. The productions of a thing, so long as they are connected with such thing, form essential parts of it, and therefore necessarily belong to the owner of it.⁹ By the separation of the productions from the thing they become independent property, and when it is not otherwise determined¹⁰ these vest in the owner of the producing thing.¹¹ This is also true of the young of animals and of the children of slaves.¹²

¹ The specifier has on that account a right of retention only, so long as he possesses the new species and has an exception *doli* against the owner's vindication: arg. §§ 30. 32. 33. 34. I. 2. 1; fr. 23. § 4. D. 6. 1. The specifier who acted *mala fide* has no claim to compensation for his labor: arg. 30. I. 2. 1.

² The threshing of another's grain, according to fr. 7. § 7. in fin. D. 41. 1, was not regarded as a case of specification; hence it cannot give a right of property. See Gaius, II. § 79; § 25. I. 2. 1.

³ When a new species is produced for him by another his condition is the same as if he produced it himself.

⁴ § 26. I. 2. 1, which is not in conflict with fr. 12. § 3. D. 10. 4; fr. 13. 14. § 3. D. 13. 1; fr. 4. § 20. D. 41. 3; fr. 52. § 14. D. 47. 2.

⁵ arg. fr. 14. D. 12. 6. and fr. 31. § 3. D. 5. 3.

⁶ Gaius, II. 79; arg. § 26. I. 2. 1; fr. 52. § 14. D. 47. 2.

⁷ The Romans did not use the word *accessio* for the acquisition of property, by one thing accruing to another, but generally understood by it the thing which accrued (§ 166, *supra*).

⁸ The common division of *accessio* into *naturalis*, *industrialis* and *mixta* is not Roman, nor is it correct.

⁹ fr. 44. D. 6. 1. Hanging fruits are regarded as part of the land (*fructus pendentes pars fundi videntur*).

¹⁰ See § 293, *infra*.

¹¹ fr. 25. pr. § 1. D. 22. 1.

¹² To which is applicable the maxim, Offspring follow the womb. (See fr. 25. D. 22. 1.) § 19. I. 2. 1; fr. 5. § 2. D. 6. 1; fr. 2–6. D. 41. 1; Const. 7. C. 3. 32.

2. Acquisition through Connection with one's Property.

a. WITH AN IMMOVABLE THING.

a. Alluvial Accretions.

§ 274. Land bounding a public stream may in various ways have alluvial accretions, provided that such land be not fixed in its boundaries (an *ager limitatus*):¹

1. When in the middle of a stream there arises an island (*insula in flumine nata*), they who own lands opposite to it on each side of the river become owners of the island, each as far as his lands extend along the shore up to a line drawn through the middle of the stream; but when the island arises on one or the other side of this middle line the owners of the nearest shore become the owners of the island so far as their adjacent lands extend.²

2. When a stream deserts its bed and leaves it dry (*alveus derelictus*), the owners of the adjacent lands divide the old bed of the stream, as in the case of a newly arisen island.³ But when on the contrary a piece of land is converted into an island by a new arm of the stream, it remains to its former owner; and thus also in the case of a mere overflow.⁴

3. When a stream makes a gradual deposit (*alluvio*) on land, the owner of the land becomes also the owner of the soil deposited.⁵

4. When a stream sunders a piece of land at once and annexes one of the pieces to other land (*avulsio*), the owner of the latter acquires such sundered piece, but only when it has become fast united to his.⁶

b. Other Cases of Accretions.

§ 275. The acquisition of property by accretion to an immovable thing other than accretion to its area may be by building (*inædificatio*), where, according to the rule *solo cedit quod solo inædificatur*, the owner of the land and surface becomes owner also of the building erected thereon.⁷ And property may also be thus acquired by sowing and planting (*satio et plantatio*) where, according to the rule *solo cedit quod solo implantatur*, the owner of the land becomes owner also of the seeds and plants.⁸

¹ fr. 16. D. 41. 1; fr. 1. §§ 6. 7. D. 43. 12. Such *agri* do not exist at the present day.

² Gaius, II. § 72; § 22. I. 2. 1; fr. 7. § 3. fr. 56. fr. 65. § 4. D. 41. 1; fr. 1. § 6. D. 43. 12.

³ § 23. I. 2. 1; fr. 7. § 5. fr. 30. §§ 1. 2. D. 41. 1; Const. 1. C. 7. 41.

⁴ §§ 22. 24. I. 2. 1. See fr. 7. § 6. D. 41. 1; fr. 1. § 9. D. 43. 12.

⁵ Gaius, II. § 70; § 20. I. 2. 1; fr. 7. § 7. fr. 16. fr. 56. D. 41. 1; Const. 3. C. 7. 41. This is also the case when the stream recedes from the shore: fr. 12. pr. fr. 30. §§ 1. 3. D. 41. 1.

⁶ Gaius, II. § 71; § 21. I. 2. 1; fr. 7. § 2. D. 41. 1.

⁷ Gaius, II. 73; §§ 29. 30. I. 2. 1; fr. 23. § 6. D. 6. 1; fr. 6. D. 10. 4; fr. 1. 2. D. 47. 3. But see § 279, *infra*.

⁸ §§ 31. 32. I. 2. 1; fr. 7. § 13. fr. 9. pr. D. 41. 1; Gaius, II. 74-76. The ownership of the seed is immediate, but not of the plants till they have taken root.

b. ACQUISITION THROUGH MOVABLE THINGS.

a. *Connection in its narrow Sense.*

§ 276. When movable things belonging to two different owners become united in one body, without the material of the one being incorporated with the other, the owner of the principal thing acquires the ownership of the accessory thing connected with it. But the former ownership is revived by a subsequent partition; and whenever a partition is practicable the former owner of the accessorial thing may institute an action *ad exhibendum* for the partition of the things connected, and then proceed for that which belongs to him.¹ Several kinds of such connection are interweaving (*intextura*),² welding (*adferruminatio*),³ painting (*pictura*), in which the picture⁴ and the writing are considered as accessory to the materials.⁵

b. *Commixture of Solids.*

§ 277. The commixture of solids belonging to different owners (*commixtio*)⁶ is fundamentally not a mode of acquiring property, though it is usually so regarded. If the mixture were made with the consent of both parties, then the product is owned in common, but this is governed by the rule of transfer; but if the mixture were accidental, or by one of the parties, then each of the parties retains his previous property in such things as he can separate from the other's things. Even when separation is impossible, as in the case of mixed grain, a proper holding in common does not take place. However, an action for the property instituted by the owner out of possession produces the same result as an action for partition when held in common.⁷

c. *Commixture of Fluids—Confusion.*

§ 278. Confusion is the mixing of fluids belonging to different owners; the mixture becomes common when it is done with the assent of the parties or was accidental, even when fluids of the same or of different kinds were mixed.⁸ When, on the contrary, the mixture was made by one party without the other's assent, then the mixture only becomes common when fluids of

¹ fr. 6. fr. 7. § 1. D. 10. 4; fr. 23. § 5. D. 6. 1.

² § 26. I. 2. 1.

³ fr. 23. § 5. D. 6. 1.

⁴ § 34. I. 2. 1. "It is ridiculous that the painting of an Apelles or Parrhasius should be regarded as an accessory to a worthless thing:" fr. 9. § 2. D. 41. 1; fr. 23. § 3. D. 6. 1; Gaius, II. § 78. On photography and printing, see Böcking, Instit. § 152, note 57.

⁵ § 33. I. 2. 1; fr. 9. § 1. D. 41. 1; Gaius, II. § 77.

⁶ The modern jurists understand by *miscere* or *commiscere* only the mixture of solids, and by *confundere* only the mixing of liquids, but the Romans used these terms promiscuously: fr. 3. § 2. fr. 5. pr. § 1. D. 6. 1; fr. 7. § 8. D. 41. 1.

⁷ § 28. I. 2. 1; fr. 5. pr. D. 6. 1. In one case commixture produces absolute property, viz., when a debt is paid with another's money, or another's money is loaned and the receiver mix it with his own: fr. 78. D. 46. 3. See fr. 11. § 2. D. 12. 1.

⁸ § 27. I. 2. 1; fr. 7. §§ 8. 9. D. 41. 1. The term accidental here, as in § 277, *supra*, includes the case when it is done by a third party alone.

the same kinds were mixed ;¹ for if the mixture were of different kinds, it is a specification, and he who made it becomes the owner of the whole, provided he compensates the other according to the rules applicable to specifications (§ 271, *supra*).²

Compensation for Loss by Adjunction.

§ 279. He who in the cases mentioned (especially in §§ 275 and 276, *supra*) has acquired as an accessory thing something which formerly belonged to another is often obliged to compensate the latter for the damages which he suffered in consequence of his loss. With respect to this there are the following distinctions :

1. When the adjunction is made by him who thereby acquires the ownership of a thing which belonged to another ; then it depends—

a. Whether the thing which he connected with his he in *bona fide* believed was his own ; for if he so believed, he need only compensate the former owner to the extent that he was enriched by it.³

b. If, on the contrary, he acted in *mala fide*, then, like a thief, he is absolutely liable for a full compensation for damages.⁴ It is only in the case of a building that the especial rule occurs that the owner of materials used in another's building does not lose his property in them ; yet he cannot recover them so long as the building stands, but he may institute the action *de tigno juncto* for double their value, whether the builder acted in *bona* or *mala fide*.⁵

2. When the adjunction is made by one who thereby loses his property in his accessorial things which he joined to those of another. Here, likewise, it depends on whether he acted in *bona* or *mala fide*. If he acted in *bona fide*, so long as he is in possession he may retain it till he is indemnified, and may protect himself by the exception *doli* against recovery by the owner ; but if he be not in possession, he has no action by the Roman law.⁶ If, on the contrary, he acted in *mala fide*, he loses his property, and is not entitled to compensation⁷ unless the thing connected by him was regarded as a necessary expenditure (§ 168. *supra*).⁸

3. When an adjunction is effected by natural events, *e. g.*, by avulsion, it is to be regarded as a casualty, and consequently he who gains by it is not obliged to compensate the loser.⁹

¹ fr. 3. § 2. fr. 4. D. 6. 1.

² fr. 5. § 1. D. 4. 6. 1 ; fr. 12. § 1. D. 41. 1 ; § 25. I. 2. 1.

³ fr. 5. § 3. fr. 23. § 5. D. 6. 1.

⁴ § 26. I. 2. 1 ; fr. 52. § 14. D. 47. 2.

⁵ § 29. I. 2. 1 ; fr. 7. § 10. D. 41. 1 ; fr. 23. § 6. D. 6. 1 ; fr. 6. D. 10. 4 ; fr. 1. D. 47. 3 ; Const. 2. C. 3. 32.

⁶ §§ 33. 34. I. 2. 1 ; Gaius, II. § 76–78 ; fr. 23. § 4. D. 6. 1.

⁷ §§ 30. 34. I. 2. 1 ; fr. 7. § 12. D. 41. 1.

⁸ Const. 5. C. 3. 32.

⁹ Many jurists are of a different opinion, but their views are not supported by the following authorities, to which they refer ; these speak only of artificial adjunction : § 31. I. 2. 1 ; fr. 5. § 3. fr. 23. §§ 4. 5. D. 6. 1 ; fr. 7. § 13. fr. 26. §§ 2. 41. 1.

D. ADJUDICATION.

§ 280. Adjudication, or the adjudging of the ownership of a thing by the judges, occurs in the actions for partition. These are the *judicium familiæ herciscundæ* (action for the partition of an inheritance) and the *judicium communi dividundo* (action for the partition of joint property or other real rights).¹ In these actions the judge has the right to adjudge to one or the other part owner the exclusive ownership of a thing that had been held in common, and his judgment *ipso jure* transfers the property in the thing adjudged,² provided that the thing divided actually belonged to the parties to the action and no part to a third person.³

E. TRADITION.

1. *Idea.*

§ 281. Delivery (*traditio*)⁴ as a mode of acquiring property rests on the principle that when the owner of a thing relinquishes the possession of it to another for the purpose of vesting in him the ownership of it⁵ the latter acquires such ownership when he so intends.⁶

2. *Requisites for Tradition.*a. *Of the Ownership and the Power of Disposition by the Transferrer.*

§ 282. The transfer of ownership in a thing to another can only be made by him who is the actual owner and has the unrestricted disposition of it. Hence, the alienation and tradition by a non-owner does not transfer the ownership to the transferee,⁷ unless such transferrer was for some special reason authorized to alienate the thing belonging to another.⁸ Alienation and tradition even by the owner of a thing, if he has not the power of disposing of it, is invalid.⁹

¹ Marz, de adjudicatione et de judiciis divisoriiis, Bonn, 1855. Adjudication takes place also in the *judicium finium regundorum* (action for settling disputed boundaries), which belongs to the actions for partition in their wide sense.

² Ulpian, XIX. 16; §§ 4. 7. I. 4. 17; Const. 3. C. 3. 37.

³ fr. 17. D. 41. 3. According to the rule *inter alios acta et judicata aliis non nocent*: Cod. 7. 60.

⁴ Donellus, comm. jur. civ. Lib. 4. c. 15–20; Glück, Comm. Vol. 8, § 580–582.

⁵ Const. 20. C. 2. 3.

⁶ fr. 55. D. 44. 7.

⁷ According to the rule in fr. 54. D. 50. 17. no one can transfer to another a greater right than he himself has (*nemo plus juris ad alium transferre potest, quam ipse habet*): fr. 20. pr. D. 41. 1. The transferee at most acquires usucapion possession. There is an exception to the above rule in the case of the fiscus, and of the regent and regentess. They transfer the property of another immediately, reserving to the owner the right to an action for damages against the fiscus, etc., within four years: § 14. I. 2. 6; Const. 3. C. 7. 37.

⁸ pr. I. 2. 8. *E. g.*, the mortgagee or pawnee: § 1. I. 2. 8; fr. 46. D. 41. 1.

⁹ pr. I. 2. 8. Thus the husband cannot alienate the dotal land (*fundus dotalis*), even with the wife's consent, nor can the pupil alienate his property without the tutor's authority: § 2. I. 2. 8; fr. 6. D. 45. 1.

b. *Intention to Transfer (Justa Causa).*¹

§ 283. The tradition of a thing by the owner does not make it the transferee's property, excepting when it is in consequence of an intention to transfer (*justa causa*);² that is, it must either be preceded by a legal transaction which gives the transferee a right to claim the ownership of the thing,³ or by some other fact expressive of the transferor's intention to transfer the ownership of the thing to the transferee.⁴ But both the transferor and the transferee must have intended to transfer and receive the ownership, and it matters not that the parties had not the same motive (*causa*) in mind,⁵ or whether the agreement itself, or in the contract of sale the credit given, was in consequence of a fraud.⁶

3. *Mode of Tradition.*

§ 284. The object of tradition is to give to the transferee the dominion over the thing, and thus enable him to exercise legal power over it by subjecting it to his physical power.⁷ Hence it follows that the tradition must be considered as complete as soon as the transferee has the physical power over it. Legally it is immaterial in which manner this is effected (§ 249, *supra*). Accordingly tradition is effected—

1. When the movable thing is placed in the hands of him who is to receive it.

2. When the grantor conducts the grantee on the land, or merely shows it to him from its vicinity, or from a place where the land can be seen, at the same time declaring to him that he conveys to him the possession of it.⁸

3. When he lays down the movable thing before the transferee, or on his order delivers it at his house (*longa manu*).⁹

4. When the transferor gives the thing to one to whom the transferee desires it shall be given (*brevi manu*).¹⁰

5. When he who already holds possession of the thing in another's name agrees with that other that he henceforth shall possess it in his own name.

¹ *Donellus*, *comm. jur. civ.* Lib. 4. c. 16; *Savigny*, *Obligationsrecht*, Vol. 2, § 78, especially p. 256, *seq.*

² When such *justa causa* is wanting the tradition does not transfer the ownership: fr. 31. pr. D. 41. 1.

³ In a contract of sale, however, the purchaser does not become owner by mere tradition, unless he has paid the price or bought on credit: § 41. I. 2. 1; fr. 19. 53. D. 18. 1; fr. 5. § 18. D. 14. 4; fr. 11. § 2. D. 19. 1. See § 462, *infra*.

⁴ *E. g.*, §§ 40. 46. I. 2. 1; fr. 9. § 7. D. 41. 1; fr. 5. § 1. D. 41. 7; fr. 3. § 1. D. 44. 7.

⁵ fr. 36. D. 41. 1; fr. 18. D. 12. 1; *Glück*, *Comm.* Vol. 4, p. 152, Vol. 8, p. 121.

⁶ fr. 11. § 5. fr. 13. §§ 27. 28. D. 19. 1; fr. 9. § 3. D. 41. 1; Const. 5. 10. C. 4. 44. But see fr. 13. § 1. fr. 14. D. 4. 4.

⁷ *Savigny*, *vom Besitz*, § 13–19.

⁸ fr. 18. § 2. fr. 1. § 21. D. 41. 2.

⁹ fr. 79. D. 46. 3; fr. 18. § 2. D. 41. 2.

¹⁰ fr. 15. D. 12. 1; fr. 43. § 1. D. 23. 3; fr. 3. § 12. D. 24. 1; fr. 1. § 21. D. 41. 2; fr. 11. pr. D. 6. 2.

In this case a delivery and redelivery are not necessary.¹ This delivery is now termed *traditio brevi manu* (§ 250, *supra*).

6. When, on the contrary, he who hitherto possessed a thing in his own name gives the ownership to another, and continues to possess it in that other's name; this is now termed *constitutum possessorium* (§ 255, *supra*).²

7. When the delivery is made by giving the means to obtain the physical possession of a thing, as, *e. g.*, the key of the enclosure in which the thing is contained.³ The modern jurists commonly regard this only as a symbol of the thing to be delivered, and hence they extend this mode of delivery, which they term *traditio symbolica*, to other signs representative of the thing.

F. PRESCRIPTION.

1. Historical Introduction.

§ 285. Prescription is the mode of acquiring property by uninterrupted possession.⁴ The twelve tables permitted the prescription of property,⁵ which subsequently was termed *usucapio*.⁶ In the case of land (*fundus*), and by interpretation a building was assimilated to land, a possession of two years was required, and in the case of other things a possession of one year.⁷ This *civilis acquisitio*,⁸ by the ancient Roman law (*dominium ex jure Quiritium*), was especially permitted in two cases, namely, one in the case of things whose possession was acquired *justo titulo* and *bona fide*, that is, under such circumstances that one was authorized to believe, and did really believe, that he was the owner,⁹ and the other in the case of the *mancipi res*, which was only received from the absolute owner,¹⁰ as also afterwards generally in the case of things which one had *in bonis* (bonitarian possession) only.¹¹ As this mode of acquisition was to give only quiritarian private ownership, hence it was not permissible as to the usual provincial land, which could not be thus held.¹² The necessity for protecting a possession of such land acquired *bona fide* and

¹ fr. 9. § 1. D. 6. 2; fr. 9. § 5. D. 41. 1; § 44. I. 2. 1; fr. 9. § 9. D. 12. 1.

² Const. 28. C. 8. 54; Const. 35. § 5. C. 8. 54; fr. 18. pr. D. 41. 2; fr. 77. D. 6. 1.

³ § 45. I. 2. 1; fr. 9. § 6. D. 41. 1; fr. 1. § 21. in fin. D. 41. 2; fr. 74. D. 18. 1.

⁴ Gaius, II. 41–61; Ulpian, XIX. 8; Paul, V. 2; Cod. Theod. 4. 13; Inst. 2. 6; Dig. 41. 3–10; 44. 3; Cod. 7. 26–40; Novel 22. c. 24; Novel 119. c. 7. 8; Novel 131. c. 6; *Cujas*, comm. ad tit. Dig. de usucapionibus, in his works, Vol. 1; *Donellus*, comm. jur. civ. Lib. 5, cap. 4, 14–31; lib. 11, cap. 11, 12; *Unterholzner*, Verjährungslehre, Vol. 2, 2d ed. Leipsic, 1858.

⁵ Cicero, Top. c. 4. pro Cæcin. c. 19.

⁶ Ulpian, XIX. § 8; fr. 3. D. 41. 3. "*Usucapio* is the addition of property by continuous possession for the designated time prescribed for it" (*Usucapio est adjectio domini per continuationem possessionis temporis lege definiti.*)

⁷ See note 5, *supra*, and Gaius, II. § 42; Theophil. ad pr. I. 2. 6.

⁸ *Unterholzner*, Vol. 1, § 30.

⁹ Gaius, II. § 43; pr. I. 2. 6; fr. 2. §§ 15. 16. D. 41. 4.

¹⁰ Gaius, II. § 41; Ulpian, I. § 16.

¹¹ Gaius, III. § 80.

¹² Gaius, II. § 46. See § 25, note 3.

justo titulo, against all attacks, was provided for, in analogy to *usucapio*, by the provision of the *honorarium jus*, the *longi temporis* prescription, or *longi temporis* possession. A continuous and uninterrupted possession acquired in the foregoing manner, and *per longum tempus*, which everywhere at the time of the classical jurists, when the parties were present (*inter presentes*), consisted of ten years, and when the parties were absent (*inter absentes*), twenty years, could be defended by an *exceptio* or *præscriptio*,¹ and at a later period of time, when it was lost, it could be recovered in an action *in rem*.² Where neither the *usucapio* nor the *longi temporis* prescription could take place, because the object was by a special prescript declared incapable of it, or where the requisite *bonum initium* was lacking, in such case under the Christian emperors the prescription of thirty and forty years against actions for property in some measure took their place.³ And by a constitution of Justinian,⁴ when one commenced *bona fide* his thirty or forty years' possession, even without *justus titulus*, he could not only as heretofore be protected as possessor by an exception against an action by the former owner, but if he became dispossessed of the thing, might recover possession by an action *in rem* from any possessor, even from the former owner of it. And also in the doctrine of *usucapio* and of *longi temporis* prescription, several important changes were made by Justinian. That kind of *usucapio* whereby the ownership which was *in bonis esse* was converted into full ownership was abolished by the provision that the previous modes of acquisition of the former (*in bonis esse*) shall give full ownership without *usucapio*,⁵ and only that kind of *usucapio* remained whereby property in things was acquired of which one became possessed *bona fide* and *justo titulo*—the same kind of *usucapio* whose place had been previously supplied by the *longi temporis* prescription in the usual provincial land. Justinian placed this land on the same footing as that of the land *in Italic solo*, so that there was no longer any extraordinary obstruction to its *usucapio*. But in the same constitution⁶ in which he in this manner extended the domain of *usucapio*, he wholly changed the time requisite for its perfection. For the *usucapio* of an immovable thing wherever situated, the same time shall be required as was usually termed *longum tempus*,⁷ and for the *usucapio* of a movable thing a term of three years. As the terms *usucapio* and *usucapere* were usually understood to mean a term of one and two years, hence Justinian named the new prescription of three years in the above-mentioned constitution *quasi usucapio*. The compilers of the *Corpus juris civilis*, in the passages

¹ Paul. V. 2. §§ 3. 5; fr. 76. § 1. D. 18. 1; Dig. 44. 3; Cod. 7. 33–35.

² Const. 8. pr. C. 7. 39. See fr. 10. pr. D. 8. 5.

³ See § 213. *supra*, note 5, and the same section generally.

⁴ Const. 8. § 1. C. 7. 39.

⁵ Const. un. C. 7. 25.

⁶ Const. un. C. 7. 31.

⁷ Justinian determined the difference between *inter presentes* and *inter absentes*, in the Const. 12. C. 7. 33.

which speak of the *usucapio* of an immovable thing, usually changed the word *usucapio* into the words *longi temporis capio*, and the word *usucapere* into the words *longo tempore capere*.¹

2. Kinds of Prescription.

§ 286. By the Justinian law there are two kinds of prescription of property,² namely, the ordinary, which is ended in three, ten and twenty years, and the extraordinary, which is ended in thirty or forty years.³

3. General Requisites for Prescription of Property.

§ 287. The general requisites for prescription are :

1. The *prescriptor* must continue uninterruptedly in legal possession of the thing whose property he desires to acquire by prescription (*continua possessio*).⁴ An interruption of possession is termed *usurpatio*.⁵

2. The possession must be *bonæ fidei*.⁶

3. And must have endured for a certain time continuously.⁷ When during the running of the prescription several possessors succeed one another an *accessio possessionis s. temporis* often occurs—that is, the predecessor's possession is added to the successor's possession.⁸ This *accessio possessionis* is imperative on the universal successor, whether it be to his advantage or dis-

¹ But in I. 2. 6. the three years prescription of property, as well as that of ten and twenty years, is termed *usucapio*.

² The modern jurists usually term this doctrine *prescriptio* (this term, however, does not occur in this sense in the Roman but in the canon law). Under this general term they include—

1. The acquiring prescription of property and of servitudes, etc. (*præscriptio acquisitiva*). The acquiring of property by prescription will be treated of here; the acquiring of servitudes by long user will be treated of in § 322, *infra*.

2. The extinguishing prescription (*præscriptio extinctiva*), as well the servitudes by long non-user (*non utendo*; see § 323, *infra*) as the actions barred by lapse of time (*temporis exceptio s. præscriptio*), which have already been mentioned in § 213–215, *supra*.

³ The former is sometimes termed *usucapio* and sometimes *longi temporis præscriptio*; the latter is usually termed *longissimi temporis præscriptio*.

⁴ fr. 25. D. 41. 3; *Unterholzner*, Vol. 2, § 183.

⁵ fr. 2. D. 5. 41. 3; *Unterholzner*, Vol. 1, § 122–130; Vol. 2, § 186.

⁶ *Unterholzner*, Vol. 1, § 91–101, § 117–121; Vol. 2, §§ 178. 179. 185. The Roman law requires only that the commencement of the *prescriptor's* possession should be in *bona fide* (*mala fides superveniens non nocet*): fr. 7. § 4. fr. 12. § 13. D. 41. 4; fr. 15. § 2. D. 41. 3, excepting where he has acquired possession by purchase, in which case he must have been in possession in *bona fide* at the time when the contract was made: fr. 48. D. 41. 3; fr. 2. pr. D. 41. 4. The canon law, on the contrary, requires *bona fide* possession during the whole time of prescription: cap. 5. cap. 20. X. 2. 26.

⁷ The time varies according to the kind of prescription.

⁸ §§ 12. 13. I. 2. 6; Dig. 44. 3; Cod. 7. 31; *Unterholzner*, Vol. 1, § 132–134.

advantage.¹ The several successor may use it when it is advantageous to him, viz., when the predecessor's possession and his own have the requisites for prescription. If his predecessor's possession be not qualified for prescription it cannot benefit him, nor will it injure him as it would in the case of an heir (universal successor).²

4. The thing must be prescriptible. Things absolutely imprescriptible are, in fact, none but those which are excluded from traffic³ because they are not the object of ownership. Things relatively incapable, that is, imprescriptible during a certain period, are those dotal things to which a wife is entitled in the case of a divorce, or on the insolvency of her husband,⁴ and the child's property (*adventitium ordinarium*) during the paternal power.⁵

4. *Special Requisites of Ordinary Prescription.*⁶

a. *Prescriptible Things* (res habilis).

§ 288. The special requisites for ordinary prescription besides the foregoing are:

1. The thing to be acquired by ordinary prescription must be capable of this kind of prescription.⁷ Things incapable of it are the property of the state and the private property of the ruler;⁸ immovable things belonging to churches and charitable institutions;⁹ things inalienable by law;¹⁰ stolen things (*res furtivæ*), and things forcibly taken (*vi possessæ*), so long as the wrong is not repaired,¹¹ as also all immovable things which a possessor alienates in bad

¹ Hence, when the estate-leaver acquired the possession *bona fide*, the heir could complete the prescription though his possession was *mala fide*; but if, on the contrary, the estate-leaver were in *mala fide*, then the heir cannot acquire by prescription, even if he were in *bona fide*: § 12. I. 2. 6; fr. 2. § 19. D. 41. 4; fr. 11. fr. 14. § 1. D. 44. 3; fr. 30. pr. D. 4. 6; Const. 11. C. 7. 32. See fr. 43. pr. D. 41. 3.

² A several successor in such case may therefore commence a prescription himself, if he be in *bona fide* possession: § 13. I. 2. 6; fr. 13. § 10. D. 41. 2; fr. 14. 15. 16. D. 44. 3; fr. 2. § 17. D. 41. 4; Const. 1. 11. C. 7. 33; Const. 4. C. 3. 32.

³ § 1. I. 2. 6; fr. 9. D. 41. 3; *Unterholzner*, Vol. 1, § 51-55.

⁴ Const. 30. C. 5. 12; *Unterholzner*, Vol. 1, § 80. Vol. 2, § 180, differs from this view.

⁵ Const. 1. § 2. C. 7. 40; Novel 22. c. 4. in fin.; *Unterholzner*, Vol. 1, §§ 34. 81.

⁶ The general as well as the extraordinary requisites of the ordinary prescription are embraced in the following verse: "*Res habilis, titulus, fides, possessio, tempus.*"

⁷ *Unterholzner*, Vol. 1, § 40-47, § 56-58.

⁸ § 9. I. 2. 6; fr. 18. D. 41. 3; Cod. 7. 38; Const. 6. C. 7. 39; Const. 14. C. 11. 61.

⁹ Novel 131. c. 6. comp. with the earlier ordinances in Const. 23. C. 1. 2; Novels 9. and 111.

¹⁰ In this case not only that alienation cannot lead to prescription, but permitting the prescription of such things is regarded as an alienation: fr. 28. D. 50. 16; fr. 9. § 5. D. 6. 2; Const. 1. 2. C. 7. 26; Const. 3. § 3. C. 6. 43; *Unterholzner*, Vol. 1, § 76.

¹¹ *Galus*, II. 45. 49, seq.; §§ 2. 3. 4. 8. I. 2. 6; fr. 4. § 6-28. D. 41. 3; *Unterholzner*, Vol. 1, § 59-71.

faith without the owner's previous knowledge, for if the latter, being cognizant of his right and of the alienation, suffers it to be done without protesting against it, then the things in the hands of a third *bonæ fidei* possessor are subject to ordinary prescription;¹ and lastly the *lucra nuptialia* (property acquired by marriage), alienated by a parent, the ownership of which has fallen to the children.² The things here enumerated, which are excepted from ordinary prescription, may be acquired by extraordinary prescription of thirty or forty years (§§ 291, 292, *infra*).

b. *Justus Titulus.*

§ 289. The second especial requisite for ordinary prescription is the *justus titulus*;³ that is, the possessor of the thing must have acquired the possession in a lawful manner, and is thereby authorized to consider himself the actual owner of the thing. When the title is founded on a void or invalid act,⁴ it is bad, excepting there were an excusable error in fact respecting it.⁵ When the possessor errs with respect to the thing to which his title relates, no prescription is founded.⁶ When one possesses a thing supposing he holds it rightfully, but has no title, a prescription can only be founded thereon in the exceptional cases,⁷ when he who has the title confirms such wrongful possession,⁸ or if he has some other sufficient title of his own,⁹ or if the party acquiring by prescription has committed an excusable error in fact.¹⁰

c. *Time.*

§ 290. The possession must have endured three years in the case of movables; in the case of immovables, ten years when the parties' domicile was in the same province (*inter præsentes*), and twenty years when they resided in different provinces (*inter absentes*).¹¹ If the parties, during the running of

¹ Novel 119. c. 7. Auth. *Malæ fidei* C. 7. 33; *Unterholzner*, § 76.

² Novel 22. c. 24. See § 580, *infra*.

³ Const. 24. C. 3. 32; Const. 6. C. 7. 14. There are a great number of titles, *e. g.*, *pro suo*, *pro emitore*, *pro herede*, *pro donato*, *pro soluto*, *pro derelicto*, *pro legato*, *pro dote*, etc. See Dig. 41. 4-10.

⁴ On the prescription on the title of a gift between husband and wife, see fr. 1 §§ 1. 2. D. 41. 6; fr. 26. pr. D. 24. 1; fr. 44. D. 24. 1; *Savigny*, *Verm. Schriften*, Vol. 3, p. 81, *seq.*

⁵ As, *e. g.*, when the alienor has not the right to sell, or when he who acts as tutor is not tutor: fr. 31. pr. D. 41. 3; fr. 2. § 15. D. 41. 4.

⁶ fr. 2. § 6. D. 41. 4.

⁷ The rule is otherwise: fr. 27. D. 41. 3; fr. 6. D. 41. 7; fr. 1. pr. D. 41. 6; fr. 2. § 2. D. 41. 4; § 11. I. 2. 6; Const. 4. C. 7. 29; Const. 4. C. 7. 33. But, according to Const. 8. § 1. C. 7. 39, the extraordinary prescription is permitted at present in such case (§ 291, div. 2, *infra*).

⁸ fr. 48. init. D. 41. 3; fr. 3. 4. § 2. D. 41. 10.

⁹ fr. 31. § 6. D. 41. 3. compare with fr. 36. D. 41. 1.

¹⁰ fr. 11. D. 41. 4; fr. 5. § 1. D. 41. 10.

¹¹ Const. 12. C. 7. 33; Const. un. C. 7. 31; Novel 119. c. 7.

the prescription, were in part *præsentes* and in part *absentes*, then the years of presence less than the term of ten years must be supplied by double the number of years of absence, so that two years of absence are computed as one of presence.¹

5. *Extraordinary Prescription.*

§ 291. When one of the special requisites of ordinary prescription is wanting, things may be acquired by extraordinary prescription; provided that the general requisites of every prescription exist. For extraordinary prescription it is requisite that the action *in rem* must be barred by prescription according to the rules of the prescription of actions in thirty or forty years, and that the possession was commenced *bona fide*.² The extraordinary prescription is effective—

1. When the thing is excluded by law from ordinary prescription, but not from the prescription of actions (§ 288, *supra*).³

2. When it lacks the requisite *justus titulus* for ordinary prescription (§ 289, *supra*).

3. When the ordinary prescription is applicable, but may be rendered ineffectual by *in integrum restitutio*⁴ extending the time.

4. When he in whose favor the prescription is running has been sued by the owner before the completion of ordinary prescription and *litis contestation* has been attained,⁵ but subsequently the suit has been permitted to lie dormant.⁶

6. *Special Requisites for Extraordinary Prescription.*

§ 292. The conditions for extraordinary prescription are stricter than those for ordinary prescription in the following particulars:⁷

1. The time requisite is usually thirty years; and in the cases where forty years are necessary for the prescription of actions (§ 214, div. 3, *supra*), the same time is necessary for extraordinary prescription.

2. The extraordinary prescription is quiescent while the owner is impubescent (§ 214, div. 2, *supra*).

3. It is tolled by the institution of the action (§ 215, div. 4, *supra*), while the *usucapion* is not tolled by the institution of an action, but the defendant

¹ Novel 119. c. 8; *Unterholzner*, Vol. 1, § 84.

² If he began the possession *mala fide*, then the prescription authorizes but one exception against the owner's action: Const. 8. § 1. C. 7. 39. compare with Const. 3. C. 7. 39. and Novel 119. cap. 7; *Unterholzner*, Vol. 1, § 91, Vol. 2, § 178.

³ Const. 8. § 1. C. 7. 39, but especially Const. 14. C. 11. 61.

⁴ This is permissible against the ordinary prescription, but not against the prescription of actions, and not against the extraordinary prescription. See § 215, div. 6, and § 223, *supra*.

⁵ See note 1, p. 230.

⁶ Const. 9. C. 7. 39.

⁷ Because the rules governing the prescription of actions apply to extraordinary prescriptions.

is not absolved from the delivery of the thing and its accessories to the plaintiff when the usucapion is completed after the *litis contestation*.¹

4. The time is computed *civiliter*; the first day is included (§ 195, *supra*); but it does not end with the beginning of the last day, as in the case of usucapion,² but at the end of that day (§ 215, div. 3, *supra*).

G. ACQUISITION OF THE FRUITS OF ANOTHER'S THING.³

§ 293. In the acquisition of ownership in the fruits of another's thing⁴ there are the following distinctions:

1. The tenant who has a claim to the fruits by the perception (taking) of them, according to the rules of tradition, acquires the property.⁵

2. The usufructuary also by perception becomes the owner of the fruits, not according to the rules of tradition, but by virtue of his real rights.⁶

3. The emphyteuta, by virtue of his emphyteutical right, whether he be in possession of the land or not, acquires the property in the fruits at the moment of their severance, instead of the owner.⁷

4. The *bona fide* possessor acquires the property in the fruits immediately on their severance, but only for the interim of his possession.⁸ He has, however, the right of consumption.⁹ Should he subsequently be compelled by the owner to surrender the principal thing, he need not compensate for the consumed or alienated fruits, but must restore those which he still possesses.¹⁰

TITLE THIRD.

RIGHTS OF THE OWNER.

I. IN GENERAL.

§ 294. Property is in its nature an unlimited and exclusive right (§ 266, *supra*).

A. By virtue of its unlimitedness the owner of a thing is authorized to dispose of its substance according to his will, and even to destroy it. Furthermore, he can relinquish his property in it, in whole or in part, or to several rights in the property, both *inter vivos* and *mortis causa*, or transfer them to another. He has the right to possess the thing, to enjoy it, and to make

¹ fr. 18. 20. 21. D. 6. 1; fr. 2. § 21. D. 41. 4. And in the *longi temporis* prescription it depends on the moment of the *litis contestation*: Const. 2. C. 2. 19; Const. 2. 10. C. 7. 33; Const. 4. C. 7. 35; Const. 26. C. 3. 32.

² fr. 6. 7. D. 41. 3; fr. 15. pr. D. 44. 3.

³ On the acquisition of the fruits of one's own property, see § 275, *supra*.

⁴ *Donellus*, com. jur. civ. Lib. 4. c. 24-26; *Savigny*, Recht des Besitzes, § 22. a.

⁵ fr. 26. § 1. fr. 61. § 8. D. 47. 2; fr. 6. D. 39. 5.

⁶ § 36. I. 2. 1; fr. 12. § 5. D. 7. 1; fr. 13. D. 7. 4.

⁷ fr. 25. § 1. in fin. D. 22. 1.

⁸ fr. 48. pr. D. 41. 1; fr. 48. § 6. D. 47. 2; fr. 4. § 19. D. 41. 3; fr. 25. § 1. D. 28. D. 32. 1; fr. 13. D. 7. 4.

⁹ § 35. I. 2. 1; § 2. I. 4. 17; fr. 4. § 2. D. 10. 1; fr. 40. in fin. D. 41. 1.

¹⁰ Const. 22. C. 3. 32. and the citations in note 6.

every lawful use of it, even though such use should produce injury to another.¹

B. By virtue of the exclusiveness of his right, he is authorized to prevent every other person from using and enjoying the thing, even though he himself should not suffer any injury from it.² He has also the right of self-defence, and is authorized even to destroy the things of others when he has reason to fear that they will cause the loss of his own or endanger his use of them.³ The presumption is therefore always in favor of this unlimitedness and exclusiveness, or freedom of property. Property, however, may be limited in either of these respects, and the cause for such restraint may be either in the will of the owner or in the law.

II. LEGAL RESTRICTIONS OF PROPERTY IN IMMOVABLES.

§ 295. Included in the legal limitations of property, in addition to the prohibitions of alienation,⁴ are servitudes, pawn-rights and liens (§ 322, div. 5, § 343–345, *infra*), and also the following:

1. The owner cannot erect on his land a building whereby his neighbor's threshing-floor would be deprived of the necessary draught of air.⁵

2. The lower land must receive the rain-water that flows from the higher land, and the owner of the lower land must not obstruct the natural flow of the water. On the other hand, the owner of the higher land must not conduct the water on to the lower land by artificial means in a larger volume, or in a new channel, otherwise the action *aquæ pluvix arcendæ*,⁶ for the restraining of rain-water, may be instituted.

3. If the roots of trees grow into the neighbor's soil, and become injurious to his building, they must be removed as far as necessary.⁷ If the branches of a tree stretch over the neighbor's building, and become injurious to it, the neighbor can require the owner of the tree to cut it down entirely; if the latter omits it, the neighbor may cut it down and retain the wood, and to enforce his right he has the interdict *de arboribus cædendis* (of cutting down trees). But if the branches merely extend over the neighbor's land, the

¹ According to the general principle, he who exercises his right injures no one (*qui jure suo utitur, neminem lædit*). (See § 194, *supra*.) fr. 151. 155. § 1. D. 50. 17; fr. 24. § 12. D. 39. 2; fr. 9. D. 8. 2.

² fr. 16. D. 8. 3; fr. 13. § 7. D. 47. 10; Const. 11. C. 3. 34; Const. 11. 14. C. 4. 38.

³ fr. 1. D. 11. 2; fr. 3. § 7. D. 47. 9; fr. 7. § 4. D. 43. 24.

⁴ *E. g.*, pr. § 2. I. 2. 8; Const. un. § 15. C. 5. 13; Const. 12. 13. C. 5. 71; Const. 3. §§ 2. 3. C. 6. 43.

⁵ Const. 14. § 1. C. 3. 34.

⁶ fr. 1. §§ 1. 2. 18. 22. 23. D. 39. 3. Nor may any one erect anything in or on any public stream, not even on his own ground, whereby the course of the stream would be altered to the injury of his neighbor, and diminish his use of the water: fr. 1. § 1–7. D. 43. 13; fr. 3. § 1. D. 43. 20; fr. 1. § 11. D. 43. 21; fr. 1. § 4. in fin. D. 39. 3; fr. 17. in fin. D. 8. 3; Const. 2. C. 3. 35; Const. 4. 7. C. 3. 34.

⁷ fr. 6. § 2. D. 47. 7; Const. 1. C. 8. 1.

latter can only require that the branches be lopped off to the height of fifteen feet from the ground; but should the owner omit it, the neighbor may do it himself and retain the wood; in this case also he has the interdict *de arboribus cædendis*.¹

4. The owner of land on which fruit falls from a neighbor's trees must permit him "*tertio quoque die*," i. e., every alternate day once, but not oftener, to gather the fruit; and in case of refusal, the neighbor has the interdict *de glande legenda*² (to gather fruit).

III. RIGHTS OF JOINT OWNERS.

§ 296. When a thing is owned by several jointly (§ 268, *supra*), then—

1. Each of the joint owners has in general a share in the product proportionate to his share in the property, and each one can make for himself the use of the thing for which it is designed.

2. But none of the joint owners, without the consent of all of the rest, can dispose of the whole thing, or of a particular part of it,³ but he may for himself alone do what is necessary for the preservation of the thing.⁴

3. Each of the joint owners may alienate his undivided share in any manner and to whom he pleases, and also may require at any time the division of the thing.⁵ The action given for this purpose is usually the action *communi dividundo*.⁶ See § 496, *seq.*, *infra*.

IV. ACTIONS AND DEFENCES.

A. REI VINDICATIO.

§ 297. The owner may judicially enforce his property in a thing against every one who withholds it from him. The action given to him for this purpose is termed action *in rem*, in its narrow sense, or *rei vindicatio*.⁷

1. But this action is only for the actual owner of the thing as a *directa* action.⁸ It is therefore requisite for its maintenance that the plaintiff must prove his ownership. Consequently if he alleges that he acquired the thing by tradition, or by any other several or universal succession, he must prove

¹ Dig. 43. 27. Opinions respecting this law differ. Many jurists hold that the owner of the tree is bound to cut off all the branches which extend over the neighbor's ground, and to lop off all the rest of the tree above the height of fifteen feet from the ground (*ut quindecim pedes altius a terra rami arboris circumcidantur*).

² Dig. 43. 28. See Savigny, Syst. Vol. 4, p. 206, *seq.*

³ fr. 28. D. 10. 3. Hence the majority of votes does not decide: Const. 1. 4. C. 4. 52.

⁴ fr. 52. § 10. D. 17. 2; Const. 4. C. 8. 10. Respecting an exception from the rule, see fr. 13. § 1. D. 8. 2.

⁵ Const. 3. C. 4. 52. See fr. 68. pr. D. 17. 2; fr. 28. D. 10. 3.

⁶ Dig. 10. 3; Cod. 3. 37. and 38; § 3. Inst. 3. 27 (28).

⁷ § 1. I. 4. 6; Dig. 6. 1; Cod. 3. 32. and 3. 19; Donellus, comm. jur. civ. Lib. 20. c. 1-7; Glück, Comm. Vol. 8, § 576-592.

⁸ fr. 23. pr. D. 6. 1. It is immaterial whether he has a full or only a partial ownership: fr. 33. *Ibid.*

that he whom he succeeded was the owner of it (§ 282, *supra*).¹ But the actual owner is entitled to this action only when he is not in possession of the thing,² or at least does not possess in his own person.³

2. The defendant here is he who possesses the thing and contests the plaintiff's right to it, or, if not actually in possession, is whom the law regards as the possessor (*fictus possessor*. § 247, *supra*).⁴ If the defendant falsely deny that he possesses the thing, and such denial is disproved, he must as a penalty surrender the possession to the plaintiff.⁵ He who possesses only in the name of another, on the institution of this action against him, and the object of the action is an immovable thing, must name the actual possessor, so that the plaintiff may institute his action against him. This is termed *nominatio auctoris s. laudatio domini*.⁶

3. The object of the action may be either a single thing or a number of corporeal things of the same kind, but not an entire estate as such, as, e. g., a *peculium* or an inheritance.⁷

4. The aim of the action is that the plaintiff be declared the owner of the thing, and that the defendant be condemned to surrender it to him with all its appurtenances (*cum omni causa*).⁸ As regards the products of the thing, the possessor *malæ fidei* must deliver up all the products which he gathered, or might have gathered, up to the time of the *litis contestation*, and he must compensate also for such as the plaintiff could have gathered had he been in possession, though such possessor could not have gathered them.⁹ The possessor *bonæ fidei*, on the contrary, has to deliver up only the fruits which he has actually gathered before the *litis contestation*, and even these only so far as they have not been consumed by him (§ 294, *supra*); but after the *litis contestation* he must surrender all the products that he has gathered or might have gathered from that time, or must make compensation for them.¹⁰

5. The plaintiff, on the other hand, is bound to perform certain obligations to the defendant. Though, in general, he is not bound to refund the price

¹ fr. 20. pr. D. 41. 1; fr. 54. D. 50. 17; *Donellus*, comm. jur. civ. Lib. 20. c. 2; *Glück*, Comm. Vol. 8, § 585.

² fr. 1. § 6. D. 43. 17. See fr. 12. § 1. D. 41. 2, and *Savigny*, Besitz, pp. 39, 422, 469.

³ § 2. in fin. I. 4. 6. relates to this case.

⁴ § 1. I. 4. 6; fr. 9. fr. 55. D. 6. 1. See fr. 27. pr. § 3. D. 6. 1; fr. 131. fr. 157. § 1. D. 50. 17.

⁵ fr. 80. D. 6. 1. Novel 118. c. 10. provides that in another case this penalty shall be imposed on a defendant who denies the plaintiff's claim.

⁶ Const. 2. C. 3. 19. See fr. 9. D. 6. 1; fr. 5. pr. D. 10. 4.

⁷ fr. 1. pr. § 3. fr. 2. fr. 3. pr. § 1. fr. 56. D. 6. 1. Documents, such as testaments, and money obligations may be the object of the *rei vindicatio*: fr. 3. D. 29. 3.

⁸ fr. 17. § 1. fr. 20. fr. 23. § 2-4. D. 6. 1.

⁹ § 2. I. 4. 17; Const. 22. C. 3. 32; Const. 2. C. 7. 51. See fr. 20. § 6. fr. 25. §§ 2. 7. fr. 13. § 2. D. 5. 3; fr. 25. §§ 4. 9. *Ibid.*; fr. 27. § 3. D. 6. 1; *Savigny*, System, Vol. 6, p. 108.

¹⁰ Const. 22. C. 3. 32. See fr. 25. § 7. D. 5. 3; fr. 17. § 1. fr. 33. D. 6. 1; § 35. I. 2. 1; fr. 48. pr. D. 41. 1; fr. 25. § 1. D. 22. 1; fr. 4. § 19. D. 41. 3.

which the defendant paid to obtain the thing,¹ yet he is obliged to refund to the defendant certain kinds of expenses which he incurred during his possession² for the benefit of the thing. If those expenses are necessary (*impensæ necessariae*), compensation must be made for them, whether the defendant be possessor *bonæ* or *malæ fidei*;³ if they be useful expenses (*impensæ utiles*), they may, in general, be demanded by the possessor *bonæ fidei*, while a possessor *malæ fidei* has only the right to take away and retain what was added through such expenditure; if they be expenses for pleasure (*impensæ voluptuariæ*), then every defendant has the right to take away the additions so far as this may be practicable without injury to the principal thing; but he must leave such additions when the owner will pay for them.⁴ According to the Roman law, these counter-claims of the defendant gave him only a right of retention, and not a right of action,⁵ if he cannot stand on a contract or quasi-contract.

B. PUBLICIANA IN REM ACTIO.

§ 298. Besides the *rei vindicatio*, the proper action founded on the civil law for the recovery of property, there is, according to the prætorian law, another action for the recovery of a thing acquired in good faith by tradition, and this is termed after the prætor *Publicius*, who first introduced it, the *Publiciana in rem* action.⁶

1. This action was originally introduced for the benefit of those who acquired the possession of a thing by usucapion through tradition *ex justa causa*,⁷ but who lost the possession before the term for usucapion was completed.⁸ This action was also permitted when one acquired the usucapion possession in any other manner than by tradition, which possession he subse-

¹ Const. 3. 23. C. 3. 32; Const. 2. C. 6. 2. Hence the defendant's remedy is against the party from whom he claims possession: Const. 16. C. 8. 45; Const. 1. C. 3. 19. On the exceptions from this rule, see Const. 16. C. 5. 71; fr. 6. § 8. D. 3. 5; fr. 6. D. 49. 15.

² A possessor can claim compensation for expenses on the products only to the extent that he has surrendered them: fr. 36. § 5. D. 5. 3; fr. 46. D. 22. 1.

³ Const. 5. C. 3. 32. But a thief cannot demand this reimbursement: fr. 13. D. 13. 1; Const. 1. C. 8. 52.

⁴ fr. 27. § 5. fr. 37. 38. D. 6. 1; fr. 38. D. 5. 3; fr. 9. D. 25. 1; Const. 5. C. 3. 32.

⁵ fr. 23. § 4. fr. 27. § 5. fr. 48. D. 6. 1; fr. 4. § 9. fr. 24. D. 44. 4; fr. 14. § 1. D. 10. 3; fr. 33. D. 12. 6.

⁶ § 4. I. 4. 6; Dig. 6. 2; *Donellus*, comm. jur. civ. Lib. 20. c. 8; *Glück*, Comm. Vol. 8, § 593-599; *Orbrock*, de Publiciana in rem actione, Göttingen, 1843.

⁷ Originally only through tradition in consequence of a purchase: fr. 7. § 11. fr. 8. D. 6. 2.

⁸ *Gaius*, IV. 36; § 4. I. 4. 6; fr. 1. pr. D. 6. 2. See fr. 3. § 1. fr. 4. fr. 5. fr. 7. § 16. 17. fr. 13. pr. D. 6. 2. It may have been a kind of the *Publiciana in rem* action that formerly he to whom a *mancipi res* was transferred could have instituted when he lost the possession before the usucapion was completed. There were, however, cases of the *in bonis esse* in which other *utiles in rem* actions were allowed. See *Gaius*, IV. §§ 34. 35.

quently lost,¹ and even in the case where one who has not acquired possession had a title which authorized usucapion and which caused and justified his belief that he had become the owner of the thing without the acquisition of possession.² The true owner may also use the *Publiciana* action in order to avoid the strict proof of his ownership, when he depends simply on the fact that he has lawfully acquired the possession of the thing by tradition; this action, however, always presumes that the thing is capable of being acquired by prescription.³

2. This action can be maintained only against a possessor whose possession is not as good as the plaintiff's was, consequently it cannot be instituted against him who likewise possesses by prescription,⁴ and still less against the true owner himself.⁵

3. The object of the action is for the recovery of the thing, with all of its appurtenances (*cum omni causa*), and the same principles apply here as in the case of the *rei vindicatio* (§ 297, *supra*).⁶

C. EXCEPTION OF THE SALE AND DELIVERY OF THE THING (*exceptio rei venditæ et traditæ*).

§ 299. A very remarkable exception which the defendant may have, both to the *rei vindicatio* action and the *Publiciana in rem* action, is the exception of the sale and delivery of the thing (*exceptio rei venditæ et traditæ*).¹

1. The exception which in the sources bears this name presumes that there was a valid² sale and a proper tradition; but though in consequence of the rule that no one can transfer to another a greater right than he himself has (*nemo plus juris in alterum transferre potest, quam ipse habet*) no property was transferred, yet because of some particular circumstance³ the real owner

¹ fr. 1. § 2. fr. 3. pr. fr. 13. pr. D. 6. 2.

² fr. 12. § 1. D. 6. 2.

³ fr. 9. § 5. D. 6. 2. See fr. 12. § 2. D. 6. 2.

⁴ Provided that the plaintiff received the thing before the defendant from the same grantor: fr. 9. § 4. D. 6. 2.

⁵ fr. 16. 17. D. 6. 2. and also fr. 1. pr. D. 6. 2, if according to the reading of the *Cod. Flor.* the comma is placed after *causa* and not after *domino*. See note 3, p. 236.

⁶ fr. 7. § 8. D. 6. 2.

⁷ Dig. 21. 3: Glück, Comm. Vol. 20, § 1128; Wiebeking, über die exc. rei vend. et trad., Munich, 1847.

⁸ In the case of an invalid sale this exception is not allowed (but see the beginning of note 9, *infra*), but in a valid but ineffectual sale there may be a replication to the exception. See, e. g., fr. 32. § 2. D. 16. 1. For other cases of a replication, see fr. 1. § 5. D. 21. 3; fr. 7. § 6. in fin. D. 41. 4.

⁹ Namely, 1. When the alienor has acquired the property after the tradition: fr. 1. pr. fr. 2. D. 21. 3; fr. 17. D. 21. 2; fr. 72. D. 6. 1, or when the alienor has afterwards acquired the right to alienate, of which he was deprived because of some other person's right: fr. 17. D. 23. 5.

2. When the real owner has become the heir of the alienor after the tradition: fr. 1. § 1. D. 21. 3; fr. 73. D. 21. 2; Const. 14. C. 3. 32; Const. 14. C. 8. 45.

3. When in ignorance of his ownership he alienated in another capacity, such as pawnee, bailee or guardian: fr. 10. D. 20. 6; fr. 49. D. 17. 1.

is estopped from contesting it.¹ This exception may be used by the grantee against any one who is the owner of the thing, and it applies not only to the heirs of those persons for whom and against whom it could have been employed originally, but likewise to their several successors.² When one not in possession could have protected his possession by this exception, then he can maintain his *Publiciana in rem* action to which the *exceptio dominii* (ownership) has been pleaded by using this exception as a replication.³

2. The *exceptio doli* (fraud) might also be employed instead of this exception.⁴

3. The latter, and under certain circumstances the *exceptio in factum* in imitation of the *exceptio rei venditæ et traditæ*, is also used in similar cases, some of which are mentioned in the sources.⁵ The rules respecting things sold or alienated in any other manner, such as gifts, cannot by analogy be applied.

TITLE FOURTH.

LOSS OF PROPERTY.

BY PASSING TO ANOTHER OWNER.

§ 300. Property to the extent of its acquisition from another may be lost by the owner from whom it was acquired. This has been explained in Title Second, *supra*.

WITHOUT PASSING TO ANOTHER OWNER.

§ 301. Property may be lost without being acquired by another—

1. When the thing perishes, or ceases to be the object of traffic (*extra commercium*).⁶

2. When the owner abandons the thing.⁷

3. When a wild animal in possession escapes, or when a tamed animal ceases to return.⁸

¹ Another kind of the *exceptio rei venditæ et traditæ* was the exception whereby before the time of Justinian he protected himself to whom the quiritarian owner had transferred only a *mancipi res*, when the alienor sued for possession before the completion of the usucapion.

² fr. 1. § 2. fr. 3. D. 21. 3; Const. 14. C. 3. 32.

³ fr. 2. D. 21. 3; fr. 72. D. 6. 1; fr. 4. § 32. D. 44. 4.

⁴ fr. 17. D. 21. 2; fr. 4. § 32. D. 44. 4.

⁵ Such as, 1. When the owner, but not his subsequent heir, warranted against eviction him to whom the thing was alienated by another: Const. 11. 31. C. 8. 45.

2. When the owner did not transfer the thing sold by him, but of which the purchaser obtained the possession in another legal way: fr. 1. § 5. D. 21. 3.

3. When the sale was made by an agent authorized by the owner, who without sufficient cause forbade the agent to deliver: fr. 16. D. 6. 2. See fr. 1. §§ 2. 3. D. 21. 3; fr. 7. § 6. D. 41. 4; fr. 7. § 3. D. 23. 3. has an example of a dilatory exception.

⁶ fr. 23. D. 7. 4. fr. 1. §§ 5. 7. D. 43. 12. See § 158, *supra*, note 1.

⁷ § 47. I. 3. 1; fr. 2. § 1. D. 41. 7; fr. 17. § 1. D. 41. 1.

⁸ §§ 12. 15. I. 2. 1; fr. 4. fr. 5. § 5. D. 41. 1. This rule is not applicable to tame animals: fr. 5. § 6. D. 41. 1.

CHAPTER THIRD.

SERVITUDES.¹

TITLE FIRST.

NATURE AND GENERAL PRINCIPLES OF SERVITUDES.

I. NATURE.

§ 302. *Servitus* (servitude) is a real right in another's thing to enjoy it, and is inseparably connected either with a certain person to whom it appertains, or with a certain immovable thing for whose benefit it serves. Of a thing whose ownership is restricted by such a real right, it is technically said *servit.*, and thus it arises that the restriction of the ownership of a thing through such a right, and the right itself, is termed *servitus*.² The reason that this technicality³ is applied to only one of the four kinds of real rights in another's property which occur in the Justinian law is that at the time of the compilation of that law the other three kinds had not been invented, as none of them, except servitudes, belonged to the Institutes of the old civil law.

II. GENERAL PRINCIPLES OF SERVITUDES.

§ 303. The following general principles are developed from the nature of servitudes, and the majority of those principles govern also in other rights in a thing (*jura in re*):

1. A servitude, as a real right in a servient thing, may be enforced against the possessor of it and against every other person.⁴

2. A servitude cannot consist in that the owner of the servient thing, or

¹ SOURCES.—Gaius, II. 28–33; Inst. II. 3–5; Dig. VII. and VIII.; Cod. III. 33. 34.

LITERATURE.—Donellus, Comm. jur. civ. Lib. 9, cap. 21, 22, Lib. 10, Lib. 11; Merillii, commentar. in tit. Dig. de servitutibus, in Otto's Thesaurus, Vol. 3, p. 613; Jami A. Costa, Comm. s. præl. ad tit. Dig. de servitutibus, in Meerman's Thesaurus, Vol. 1, p. 697; D'Avezan, servitutum liber, Orleans, 1650, and in Meerman's Thes. Vol. 4, p. 119; Westphal, de libertate et servitutibus prædiorum, Leipsic, 1773; K. S. Zachariæ, in Hugo's Civ. Mag. Vol. 2, No. 15; C. E. Münter, von den servituten, 2 vols., Hanover, 1806, 1810; Glück, Commentar, Vol. 9. and 10 to § 690; Luden, Die Lehre von den servituten, Jena, 1837; E. Hoffmann, Die Lehre von den servituten, 2 vols., Darmstadt, 1838, 1843; Zielonacki, Krit. Erörterungen über die servitutenlehre, Breslau, 1849; R. Elvers, die Röm. servitutenlehre, Breslau, 1856.

² § 3. I. 2. 2; Inst. 2. 3. On the Roman idea of servitude (*servitus*) and right in another's thing (*jus in re aliena*), see Savigny, vom Besitz, p. 118; Unterholzner, Verjährungslehre, Vol. 2, § 191.

³ With this is connected the idea that in the absence of a servitude it is termed *libertas rei* (free ownership of a thing): fr. 6. 7. 32. § 1. D. 8. 2; fr. 34. pr. D. 8. 3; fr. 16. in f. fr. 18. § 2. D. 8. 6; fr. 4. § 29. D. 41. 3; and that a thing not burdened with a servitude is termed a thing of great excellence (*res optima maxima*): fr. 80. 169. D. 50. 16; Cicero, de lege agrar. 3. 2.

⁴ fr. 20. § 1. D. 41. 1; fr. 5. § 9. D. 39. 1.

any other person, shall do something for the benefit of the dominant party (*in faciendo*). The owner of a thing may, however, bind himself to do something in relation to it for the benefit of another, yet this would establish no right in the thing itself, but merely an obligation.¹

3. A servitude can exist only in another's thing, not in a thing which belongs to one's self. *Nulli res sua servit.*²

4. A corporeal thing only can be the object of a servitude, and hence there cannot be a servitude in a servitude. *Servitus servitutis esse non potest.*³

5. The servitude must be advantageous to the person or thing entitled.⁴

6. A thing is never presumed to be burdened with a servitude; when a doubt exists,⁵ the establishment of one is to be strictly construed, and it must be exercised precisely in the manner prescribed, and in such a way as will be least burdensome to the owner of the servient thing.⁶

TITLE SECOND.

OF THE SEVERAL KINDS OF SERVITUDES.

DIVISION OF SERVITUDES IN GENERAL.

§ 304. Servitudes are—

1. Either such as are established merely for the advantage of a certain determined person, so that they relate to this person alone, and are extinguished at his death.⁷ These the Romans term personal servitudes.⁸

2. Or they are such as are established for the benefit of land, so that they pass with the land to every new owner of it. Servitudes of this kind the Romans term *jura s. servitutes prædiorum s. rerum*,⁹ or simply *servitutes*.¹⁰ At the present time they are termed real or prædial servitudes, or privileges of land.

I. PERSONAL SERVITUDES.

§ 305. All personal servitudes have this peculiarity, that they are eminently personal rights, and hence they cannot be separated from the person of the

¹ fr. 15. § 1. D. 8. 1. fr. 6. § 2. D. 8. 5; fr. 81. § 1. D. 18. 1; *Johannknecht*, *explo-ratio questionis*: an servitus in faciendo consistat, Göttingen, 1807.

² fr. 5. pr. D. 7. 6; fr. 26. D. 8. 2; fr. 78. pr. D. 23. 3. But in a thing held in common, there may be a servitude for the benefit of one of the owners: fr. 10. D. 7. 9; fr. 8. fr. 27. pr. fr. 40. D. 8. 2.

³ fr. 1. D. 33. 2; fr. 33. § 1. D. 8. 3.

⁴ fr. 15. pr. D. 8. 1; fr. 19. D. 8. 1. is not *contra*. See § 315, *infra*, note 6.

⁵ fr. 13. § 1. D. 8. 4; Const. 9. C. 3. 34.

⁶ fr. 20. § 5. D. 8. 2; fr. 4. § 1. 2. fr. 5. § 1. D. 8. 1; fr. 24. fr. 33. § 1. D. 8. 5.

⁷ § 3. I. 2. 4; pr. I. 2. 5; fr. 3. § 3. D. 7. 4. See note 1, p. 256, *infra*.

⁸ fr. 1. 15. D. 8. 1; fr. 8. § 3. D. 34. 3.

⁹ § 3. I. 2. 3; fr. 1. § 1. D. 8. 4; fr. 1. D. 8. 1.

¹⁰ *E. g.*, in the rubric D. de servitutibus 8. 1, and generally in this whole title, as well as everywhere, the term *servitus* occurs, without any suffix.

party entitled to them,¹ and are extinguished at his death,² unless they were granted to him expressly for himself and his heirs.³ To these belong, according to the Roman law, the usufruct (*usufructus*) and the use (*usus*) of another's thing, the right of dwelling in another's house (*habitatio*), and the services of another's slave or beast (*operæ servorum et animalium*).

A. USUFRUCT.

1. *Its Nature.*

§ 306. Usufruct⁴ is that real right in another's thing by virtue of which the entitled party is authorized to reap all the products of the thing, and in general to have its entire use and enjoyment as far as is practicable without injury to its substance.⁵ The entitled party is termed *fructuarius* or *usufructuarius*, and the owner of the thing, who in this case has merely the naked property (*nuda proprietas*) (§ 269, *supra*),⁶ is termed *proprietaryus s. dominus proprietatis*, and the thing itself is termed *res fructuaria*.

2. *Its Object.*

§ 307. As the usufruct gives no right to the substance of the thing, and consequently none to its consumption, hence only an inconsumable thing can be the object of it, regardless whether it be a movable or immovable thing.⁷ This was the doctrine of the ancient Roman law; but, in later times,⁸ the right of usufruct was, by analogy, extended to consumable things, and therewith arose the distinction between *verus* and *quasi usufructus*,⁹ and contemporaneously the characteristics of usufruct were also extended to the usufruct of the whole or part of the estate (*usufructus omnium s. partis bonorum*). A usufruct of the latter kind embraces all the constituent parts of the estate

¹ § 3. I. 2. 4; fr. 66. D. 23. 3; fr. 15. D. 10. 2; fr. 37. D. 8. 3.

² § 3. I. 2. 4; pr. I. 2. 5; fr. 3. § 3. D. 7. 4; Const. 3. pr. Const. 12. pr. Const. 14. C. 3. 33.

³ In this case, however, the servitude becomes extinct by the death of the party entitled to it, and only commences anew in the person of his heir: fr. 37. § 12. D. 45. 1.

⁴ Inst. 2. 4; Dig. 7. 1; Cod. 3. 33; Paul, III. 6. § 17-26; *Fragm. Vaticana tit. de usufructu*. On the whole doctrine, *Donellus*, *Comm. jur. civ. Lib. 10*; *Ger. Noodt*, *de usufructu*, in his works, Vol. 1.

⁵ Pr. I. 2. 4; fr. 1. D. 7. 1. Consequently the *usufructus*, or the right to use the fruit of another's thing, must not be confounded with the owner's right of enjoyment (§ 294, *supra*). The latter is never termed by the Romans *usufructus*, and in fr. 5. pr. D. 7. 6. fr. 78. pr. D. 23. 3. it is expressly stated that the owner of a thing neither has nor can have the usufruct in it: *nulli enim res sua servit* (§ 303, *supra*).

⁶ § 1. I. 2. 4.

⁷ Pr. § 1. I. 2. 4; fr. 2. D. 7. 1.

⁸ By a *senatusconsult* of an uncertain time: fr. 1. D. 7. 5; § 2. I. 2. 4; *Hugo*, *Gesch. des Röm. Recht.* p. 764.

⁹ § 2. I. 2. 4; Dig. 7. 5. See § 310, *infra*.

remaining after the deduction of the debts, and the inconsumable corporeal things belonging to the estate are to be regarded as *verus ususfructus*, and the remaining constituent parts¹ of the estate are regarded as *quasi ususfructus*.

3. *Rights of the Usufructuary.*

§ 308. In a case of true usufruct the usufructuary has the following rights :

1. He may fully use and enjoy another's thing, as far as this can be done, according to its form and condition, without injury to its substance, and without restriction of its use to only his personal necessities.² Accordingly, he has the right to gather all the products ungathered at the commencement of the usufruct,³ and all those produced during its continuance,⁴ but he does not become the owner of the products till he has gathered them, and hence all products not gathered by him at the end of the usufruct descend not to his heirs, but to the owner of the thing producing them.⁵

2. He has furthermore the right to exercise all servitudes appertaining to the thing.⁶

3. He may permit the exercise of his usufruct to another for compensation or gratuitously.⁷ But the right to the usufruct itself is inseparable from his person ; he cannot transfer it to a third party, but may surrender it to the owner of the thing.⁸

4. *Duties of the Usufructuary.*

§ 309. The usufructuary's duties are :

1. He must bear all the burdens and taxes imposed on the thing.⁹

2. He must use the thing like a prudent family father, and as such he must see that it is kept in good condition, otherwise he will be liable to the owner in damages.¹⁰ But if the expenses for repairs and maintenance are too burdensome he can release himself from them by abandoning the usufruct.¹¹

¹ fr. 24. pr. fr. 37. fr. 43. D. 33. 2 ; fr. 39. § 1. D. 50. 16 ; Const. 1. C. 3. 33.

² The Roman law contains very many special provisions respecting this. See § 37. I. 2. 1 ; fr. 9. § 7. fr. 10. 11. fr. 12. pr. fr. 18. fr. 59. § 2. D. 7. 1.

³ fr. 27. pr. D. 7. 1.

⁴ fr. 59. § 1. D. 7. 1 ; fr. 25. § 1. D. 22. 1.

⁵ § 36. I. 2. 1 ; fr. 13. D. 7. 4 ; fr. 12. § 5. D. 7. 1 ; fr. 25. § 1. D. 22. 1 ; fr. 8. D. 33. 1. Comp. *supra*, note 1, p. 146, but especially § 293, and respecting the *fructus civiles*, fr. 25. § 6. fr. 26. fr. 58. pr. D. 7. 1.

⁶ fr. 1. pr. fr. 5. § 1. D. 7. 6. compare with fr. 1. § 20. fr. 2. D. 39. 1 ; fr. 1. § 4. D. 43. 25.

⁷ fr. 12. § 2. D. Ibid. comp. fr. 38. 39. 67. D. Ibid. ; Const. 13. C. 3. 33. The usufruct may be pledged : fr. 11. § 2. D. 20. 1.

⁸ fr. 15. 16. pr. D. 10. 2 ; Paul, sent. rec. 3. 6. § 32 ; Gaius, II. 30 ; § 3. I. 2. 4 ; Glück, Comm. Vol. 9, p. 223.

⁹ fr. 10. D. 50. 17 ; fr. 7. § 2. fr. 27. § 3. fr. 52. D. 7. 1.

¹⁰ fr. 1. §§ 3. 7. fr. 2. D. 7. 9 ; fr. 9. pr. fr. 13. § 2. fr. 15. § 3. fr. 65. pr. fr. 60. D. 7. 1 ; § 38. I. 2. 1. But he is not liable if the thing be worn out by ordinary use : fr. 9. § 3. D. 7. 9.

¹¹ fr. 48. pr. fr. 64. fr. 65. pr. D. 7. 1. See § 323, *infra*.

3. When his right is ended he must restore the thing itself to the owner.

4. To secure the performance of his duties at the commencement of his usufruct he must indemnify the owner by bail or pledge (*cautio usufructuaria*).¹ The owner is not bound to deliver to the usufructuary the possession of the thing till this security is given, and if possession has already been given the owner may institute an action to compel him to give security or to return the thing.²

5. Rights and Duties of the Quasi-usufructuary.

§ 310. In the case of a quasi-usufruct of things which are consumed by use³ the usufructuary becomes the substantial owner of the thing producing fruit (*res fructuaria*), and he thereby acquires the right to consume the thing. But at the termination of his right he must either restore a like quantity to that which he received of things of the same kind and quality or pay their value in money. For this restitution or payment security must be given.⁴ As regards the usufruct in clothing it is in doubtful cases to be taken as a true usufruct, if it be not given expressly as a quasi usufruct.⁵ The *usufructus nominis* (of an estate or money) is a kind of the quasi-usufruct.⁶ The usufructuary may in doubtful cases collect the outstanding debts,⁷ and at the time of payment acquires the usufruct on that received, which is sometimes a quasi-usufruct of the thing and sometimes a true usufruct.

B. USE.

§ 311. The right of use (*usus*)⁸ is that personal servitude by virtue of which the party entitled to it, irrespective of the wants of himself or family, may make every use of another's thing which its nature and character permit. Consequently the use in itself gives no right to the products, but only to the use of the thing. When, however, this is of such a nature that it cannot be used at all, or at least not completely without the enjoyment of the products, the usuary is entitled to a moderate share of the products according to his wants.⁹

¹ Dig. 7. 9. The owner may remit the security, excepting in the case where the usufruct has been created by testament: Const. 1. C. 3. 33; Const. 7. C. 6. 54. See fr. 8. D. 7. 5. On the various opinions, see *Höpfner*, Comm. § 373; *Glück*, Comm. Vol. 9, § 654.

² fr. 13. pr. D. 7. 1; fr. 7. pr. D. 7. 9.

³ § 2. I. 2. 4; Dig. 7. 5.

⁴ fr. 7. D. 7. 5. See § 2. I. 2. 4; fr. 5. § 1. D. 7. 5.

⁵ fr. 15. § 4. D. 7. 1; § 2. I. 2. 4. and the gloss on it; fr. 9. § 3. D. 7. 9; *Donellus*, Lib. 10. c. 4; *Noodt*, de usufr. Lib. 1. c. 21. See *Glück*, Comm. Vol. 9, §§ 643. 644.

⁶ See § 307, *supra*, note 4.

⁷ fr. 3. 4. D. 7. 5; Const. 1. C. 3. 33. Of course when the debtor himself becomes the usufructuary it is an excepted case.

⁸ Inst. 2. 5; Dig. 7. 8-33. 2; *Savigny*, vom Berufe unserer Zeit., p. 101.

⁹ The following passage will explain the nature of use: fr. 2. pr. D. 7. 8. The rights of the usuary in relation to houses, villas, oxen, horses, sheep, etc., *s. g.*, fr. 12. § 2. D. 7. 8. Sometimes the use gave as complete a right as the usufruct, for example, fr. 22. pr. D. 7. 8.

The usufruct, however, cannot permit the exercise of his right by another, at least not wholly and exclusively.¹

C. HABITATION.

§ 312. The right of dwelling (*habitatio*),² or the right of free residence in another's house, was among the Romans substantially the same as the usufruct, or *usus ædium*;³ but it seems that the term *habitatio*, or the use of a house (*usus ædium habitandi causa*), was employed only in cases where a habitation was given to a necessitous person as a charity. Hence the inhabitant could permit the exercise of his right by another for a compensation, but not gratuitously,⁴ and therefore the *habitatio*, like the usufruct and use, is not lost by loss of status or non-user.⁵ *Habitatio* has also the characteristics that when granted as a pure *donatio inter vivos* it could be revoked by the donor's heirs.⁶

D. WORK OF SLAVES (*operæ servorum*).

§ 313. The *operæ servorum et animalium*, among the Romans, consisted in the right to enjoy every use and advantage from the services of another's slave or animal which, according to their peculiar nature or quality, could be derived from them.⁷ As in the case of *habitatio*, this right is not lost by loss of status or non-user. The legacy of work (*legatum operarum*) differs from legacies of other personal servitudes in that it is transmitted to the heirs of the legatee, at least in the case when the legatee dies after the legacy was acquired (*dies legati cessit*) and had not yet come into the enjoyment of the legacy,⁸ and that the slave or animal was not usucapioned by a third person before the acquisition of the legacy.

II. PRÆDIAL SERVITUDES.⁹

A. NATURE.

§ 314. By prædial servitude is meant a right which is granted in one piece of land for the benefit of another piece of land, and which may be exercised by every owner of the dominant land against every owner of the servient land.¹⁰ Hence there always must be two pieces of land (*prædium*) belonging

¹ § 1. I. 2. 5. See fr. 2. § 1. fr. 3. fr. 4. fr. 8. pr. D. 7. 8. And not gratuitously, because this is regarded as *fructus civilis*.

² Inst. 2. 5; Dig. 7. 8; Cod. 3. 33.

³ fr. 10. pr. D. 7. 8.

⁴ § 5. I. 2. 5; Const. 13. C. 3. 33; fr. 10. pr. D. 7. 8.

⁵ fr. 10. D. 4. 5. See § 3. I. 2. 4. and pr. I. 2. 5. See note 1, p. 256, *infra*.

⁶ fr. 27. 32. D. 39. 5.

⁷ Dig. 7. and 33. 2; fr. 6. pr. D. 7. 7.

⁸ fr. 2. D. 7. 7; fr. 2. D. 33. 2. See § 323, note 1, p. 256, *infra*, and 4th note to § 712, *infra*. Unterholzner, Verjährungslehre, Vol. 2, p. 216.

⁹ Inst. 2. 3; Dig. 8. 1-6; Cod. 3. 34; *Cujas*, recitat. ad Dig. lib. 8. tit. 1-6. (in his works, Vol. 7); *Donellus*, Comm. jur. civ. Lib. 11. cap. 1-8. 13. 14.

¹⁰ fr. 12. D. 8. 4; Const. 3. C. 3. 34.

to different owners,¹ one of which is burdened with the servitude (*quod debet servitutum, prædium serviens s. fundus servus*),² and one for whose advantage the servitude is conferred (*cui debetur servitus, quod habet servitutum*), and which is now termed *prædium dominans*.³ Such lands need not be adjoining, but must be in the vicinity of each other, and must have such a natural location to each other as to render the exercise of the servitude practicable.⁴

B. GENERAL PRINCIPLES OF PRÆDIAL SERVITUDES.

§ 315. The general principles of prædial servitudes⁵ are—

1. The servitude must be such as to be advantageous to the dominant land, by increasing either its value or its acceptability.⁶

2. The servitude must have *causam perpetuam*; *i. e.*, the servient land must from its natural character be permanently capable of affording the intended advantage to the dominant land, and that, too, without the necessity for any manual act on the part of the owner of the servient land.⁷

3. The servitude is to be regarded as an appurtenance of the dominant land, and hence it passes with the land to every new owner of it, and can neither be alienated, pledged nor leased without the land to which it appertains, nor can it be transferred from the same to other land.⁸

4. Prædial servitudes are indivisible, and therefore cannot be partially acquired or lost.⁹

5. When a prædial servitude is unconditional, it may generally be exercised in all the servient land,¹⁰ but such exercise must be restricted to the actual necessities of the dominant land.¹¹ By special agreement these servitudes may be restricted as to time and place, and also in regard to the mode of their exercise.¹²

¹ fr. 1. § 1. D. 8. 4; § 3. I. 2. 3; fr. 14. § 3. D. 34. 1; fr. 5. D. 8. 3.

² fr. 9. D. 8. 1; fr. 14. D. 8. 2; fr. 23. § 2. D. 8. 3; fr. 20. § 1. D. 41. 1.

³ fr. 23. §§ 2. 3. D. 8. 3.

⁴ fr. 5. § 1. fr. 7. § 1. D. 8. 3; fr. 38. D. 8. 2; fr. 7. § 1. D. 8. 4; fr. 5. D. 8. 5.

⁵ Vangerow, Pand. Vol. 1, § 340.

⁶ fr. 15. pr. D. 8. 1; fr. 3. pr. D. 43. 20; fr. 86. D. 50. 16. From these principles are deduced—

1. It is immaterial whether the servitude has any value personally to the owner of the land, to whom it was granted: fr. 19. D. 8. 1.

2. A right which has been granted to one, in the land of another, merely for his personal pleasure or use, is not a prædial servitude: fr. 8. pr. D. 8. 1.

⁷ fr. 28. D. 8. 2; fr. 23. § 1. D. 8. 3; fr. 2. D. 8. 4; fr. 1. § 4. D. 43. 22. See fr. 3. D. 8. 3. Heineccius, de causa servitutum perpetua, in his works, Vol. 3, p. 177.

⁸ fr. 16. D. 8. 1; fr. 44. D. 19. 2; fr. 33. § 1. D. 8. 3; fr. 11. § 3. fr. 12. D. 20. 1. See § 336, *infra*.

⁹ fr. 11. 17. D. 8. 1; fr. 18. fr. 32. D. 8. 3; fr. 6. pr. D. 8. 6; fr. 5. D. 7. 1. On the consequences and limitations of this rule, see fr. 23. § 3. fr. 25. D. 8. 3; fr. 140. § 2. D. 45. 1; Heintzelmann, die Untheilbarkeit der servituten, Nördl. 1854.

¹⁰ fr. 21. D. 8. 3; fr. 9. D. 8. 1.

¹¹ fr. 5. § 1. in fin. D. 8. 3; fr. 9. D. 8. 1.

¹² fr. 4. pr. §§ 1. 2. fr. 6. D. 8. 1; fr. 13. § 1. D. 8. 3. By the annexation of the

6. In general, a prædial servitude may be exercised by every owner of the dominant land, excepting when it is restricted expressly to the person of the original grantee.¹

7. The person entitled to exercise a servitude may do every thing without which such exercise would be impossible;² however, in general, he cannot require that the owner of the servient thing shall repair it, but he must do it himself when such repairs are necessary for the exercise of the servitude.³

8. All prædial servitudes belong to the dominant land itself, and not merely to its *superficies*; that is, to all which is on the land, even though they were specially designed for the benefit of the superficies. So, likewise, they are imposed on the servient land, and not only on its superficies.⁴

C. KINDS OF PRÆDIAL SERVITUDES.

§ 316. Prædial servitudes are—

1. Either servitudes or *jura prædiorum urbanorum* or servitudes or *jura prædiorum rusticorum*.⁵ By *prædium urbanum* is meant a building, without distinction, whether it be situated in town or country, and by *prædium rusticum* is meant every other kind of land.⁶ A servitude *prædii urbani* is therefore a right conferred on urban land, while a servitude *prædii rustici* is one that is conferred on rustic land.⁷ There are, however, some servitudes which are usually urban, but which may be conferred on rustic land, while some of those that are usually rustic may be conferred on urban land.⁸ The prædial servitudes are partly such as are termed servitudes *prædii urbanorum*, because

ending of the term, or of a condition subsequent, the duration of a prædial servitude can be limited: fr. 4. pr. D. 8. 1. See fr. 15. D. 7. 4; Const. 5. C. 3. 33.

¹ fr. 15. pr. D. 8. 1; fr. 56. § 4. D. 45. 1; fr. 1. D. 33. 2. There is a great contest respecting the question to what extent a right which is usually regarded as a prædial servitude shall not be considered as such, but as a personal servitude. The passages which are said to sustain the latter are chiefly fr. 32. D. 7. 1; fr. 4-6. pr. fr. 37. D. 8. 3; fr. 6. D. 33. 3; fr. 14. § 3. D. 34. 1.

² fr. 10. D. 8. 1; fr. 20. § 1. D. 8. 2; fr. 3. § 3. D. 8. 3.

³ fr. 6. § 2. D. 8. 5; arg. fr. 15. § 1. D. 8. 1; fr. 81. § 1. D. 18. 1. An exception is made only in the case of a servitude to bear a burden (*e. g.*, a house, *servitus oneris ferendi*): fr. 6. § 2. fr. 8. pr. § 2. D. 8. 5; fr. 33. D. 8. 2. See § 317, note 4, *infra*.

⁴ fr. 13. pr. D. 8. 3; fr. 11. pr. D. 8. 2; but see fr. 3. D. 8. 1.

⁵ § 3. I. 3. 2; fr. 1. D. 8. 1.

⁶ Thus Ulpian states in fr. 1. pr. D. 8. 4. and fr. 198. D. 50. 16. But Neratius states otherwise in fr. 4. § 1. D. 20. 2. Ulpian's views, however, prevailed: § 1. I. 2. 3. *Prædium rusticum* is the same as *fundus* (land) in its narrow sense, and *prædium urbanum* is the same as *ædificium* (a building): fr. 211. D. 50. 16; comp. with fr. 60. 198. D. 50. 16. The view frequently stated that Ulpian used the expressions in fr. 3. D. 20. 2. in the same sense as Neratius did is incorrect.

⁷ § 1. I. 2. 3.

⁸ fr. 2. D. 8. 2; comp. with fr. 2. § 1. D. 8. 3; fr. 11. § 1. D. 6. 2; fr. 14. § 1. D. 8. 1. When this occurs, the servitude is usually termed irregular.

they are always, or at least usually, for the benefit of a building, and partly such as are termed servitudes *prædii rusticorum*, because they are always, or at least usually, for the benefit of land.

2. Prædial servitudes are either those by virtue of which the owner of the servient land must suffer something to be done which as an absolute owner he need not suffer (*in patiendo consistunt*), or those by virtue of which he is either forbidden to do something, or may be forbidden, which as an owner he is permitted to do (*in non faciendo consistunt*). The former are termed affirmative, the latter negative, servitudes.¹

The number of prædial servitudes is not limited. The Roman law only prescribes the general conditions that are required to constitute such servitudes (§ 315, *supra*). Subject to these conditions, there may be created as many and diverse prædial servitudes as there may be rights, which one piece of land may for its benefit have in another piece of land.² Accordingly, the prædial servitudes expressly mentioned in the Roman law, and enumerated in §§ 317, 318, *infra*, are to be regarded only as examples of such servitudes as are of most frequent occurrence.

1. Urban Prædial Servitudes.³

§ 317. The principal urban prædial servitudes which occur in the Roman law are the following:

1. The servitude *oneris ferendi*, or the right to rest one's building on the building, wall or pillars of one's neighbors. This servitude has the peculiarity that every owner of the servient wall must keep it in such order and repair as was agreed on at the creation of the servitude, but when nothing to the contrary has been especially agreed on, he must at least preserve it in the condition it was when the servitude was created.⁴ He is at liberty, however, by relinquishing the servient wall, to release himself from the burden of keeping it in repair. It is the duty, however, of the dominant owner to support the building during the repair of the wall on which it rests.⁵

2. The servitude *tigni immittendi*, or the right of inserting beams in a neighbor's wall, as, for example, to form a covered walk beside it (*porticus ambulatoria*), or merely for the greater security of one's building.⁶ If the

¹ fr. 15. § 1. D. 8. 1. See § 303, note 2, *supra*. This division applies to all servitudes, but the personal servitudes belong to the affirmative, while the prædial servitudes, and especially urban servitudes, are of both kinds. On the division between *servitutes continuæ* and *discontinuæ*, see § 325, *infra*.

² *E. g.*, fr. 3. §§ 1. 2. D. 8. 3.

³ *Glück*, Comm. Vol. 10, § 667-673.

⁴ fr. 6. §§ 2. 5. 7. fr. 7. D. 8. 5; fr. 33. D. 8. 2. This characteristic of the servitude *oneris ferendi* has been explained in wholly different ways: *Glück*, Comm. Vol. 10, § 661.

⁵ fr. 6. § 2. in fin. fr. 8. pr. D. 8. 5.

⁶ fr. 8. §§ 1. 2. D. 8. 5; fr. 242. § 1. D. 50. 16.

beams have become useless, the dominant party may replace them with new beams, but he has no right to increase the number.¹

3. The servitude *projiciendi*, or the right to build a projection, such as a balcony or a gallery, from one's house in the open space belonging to one's neighbor. One kind of this servitude is the servitude *proptegendi*, or the right of placing on one's building a shed projecting into the open space belonging to one's neighbor.² These two servitudes rest on the principle that property in land extends also to the aerial space above the land.

4. The servitude *stillicidii s. fluminis recipiendi s. avertendi s. immittendi*. *Stillicidium* is the drip of water from the eaves, and *flumen* is the rain-water collected from the roof and carried off by the gutters. The servitudes spoken of consist either in the right to conduct the water from one's house on to the house or ground of one's neighbor,³ or in the right to conduct the water from a neighbor's house on to one's own house or land, for the purpose of cleansing or irrigation.⁴ The release from a servitude of this kind was also regarded by the Romans as a special kind of quasi-servitude, and was termed the *jus stillicidii s. fluminis non recipiendi*.⁵

5. The servitude *altius non tollendi*, by which for the neighbor's advantage one dare not build his house higher than it is, or above a certain height.⁶ A release from such a restriction, and the obtaining from one's neighbor the right to build higher, was termed by the Romans the *jus altius tollendi*.⁷

¹ fr. 14. pr. D. 8. 5. See fr. 11. pr. in fin. D. 8. 6.

² fr. 2. D. 8. 2; fr. 242. § 1. D. 50. 16; fr. 29. § 1. D. 9. 2.

³ § 1. I. 2. 3; fr. 2. fr. 17. § 3. fr. 20. § 3-6. D. 8. 2; fr. 8. pr. D. 8. 6; fr. 16. D. 8. 5.

⁴ Many jurists consider this as a servitude *stillicidii non recipiendi*: *Vinnius*, in the commentary on § 1. I. 2. 3. and § 2. I. 4. 6; *Glück*, Vol. 10, p. 125. But see fr. 28. D. 8. 2.

⁵ At least Theophilus, ad § 1. I. 2. 3, thus represents it. But it cannot be denied that this view disagrees with the nature of a servitude considered as a restriction of the natural freedom of ownership. Still with regard to the urban prædial servitudes, the Romans seem to have considered as a servitude, or at least as a right similar to a servitude, not only the restriction of the ownership itself, but also the reacquired right of the natural freedom of ownership by the dissolution of a former servitude. And thus is explained not only the *jus stillicidii non recipiendi* in the sense given by Theophilus, but also the *jus altius tollendi* and *luminibus officiendi*: fr. 2. 21. 32. pr. D. 8. 2; fr. 26. pr. D. 44. 2; fr. 2. pr. D. 8. 3. This is Mackeldey's view; but see, also, note 7.

⁶ § 1. I. 2. 3; fr. 2. fr. 11. § 1. fr. 12. 21. 32. pr. D. 8. 2; fr. 7. § 1. fr. 16. D. 8. 4; Const. 8. 9. C. 3. 34.

⁷ See note 5 and the authorities cited at its end, and see also *Hugo*, *Rechtsgeschichte*, p. 504. *Cujas* is also of this opinion, in the last note to § 2. I. 4. 6. The view presented in note 5 is contested by *Schilling*, *Bemerk. über Römische Rechtsg.* p. 144, *seq.*, and *Unterholzner*, *Verjährungslehre*, Vol. 2, pp. 118, 119, 127, 128. To this extent the opinion of Mackeldey has been given. The present editor of the German edition (*Fritz*) agrees with him in that opinion so far as it relates to the Roman technology, and also where he treats of the right of natural freedom

6. The servitude *luminum*, and *ne luminibus officiatur*, as also the servitude *de prospectu*, and *ne prospectui officiatur*. *Lumina* are windows, or openings to obtain light for one's building, and in general the light that one's building has or requires; *prospectus* is the view.¹ The servitude *luminum s. luminis excipiendi s. immittendi*, or *fenestræ aperiendæ*,² is therefore the right of one to make windows or other openings in a wall belonging to another, or common to both, in order to obtain light for one's building,³ or in one's own wall overlooking a neighbor's premises, even if this be forbidden by some especial laws.⁴ The servitude *ne luminibus officiatur* consists in this, that one cannot deprive his neighbor's building of light, by buildings, vegetation or other obstructions. Whether in such case he must leave to his neighbor's building merely the necessary light, or all the light which it had, depends on the conditions on which the servitude was acquired or granted.⁵ The servitude *de prospectu*, or *ne prospectui officiatur* (there being no difference between them), consists in the right of preventing one's neighbor from obstructing the prospect from one's house or land, by buildings or other hindrances.⁶ The release from a

which was never lost, but not on the reacquisition of the former servitude by the dissolution of it. He however does not recognize this as the only meaning of *jus altius tollendi*, but finds mentioned in fr. 7. pr. D. 8. 5. a right of this name, which is to be regarded as an essential part of a true servitude. See fr. 8. D. 8. 5. and fr. 24. D. 8. 2. Respecting the manner in which the actions *in rem* in § 2. I. 4. 6, relating to the *jus altius tollendi*, are mentioned, see § 324, *infra*.

¹ fr. 16. D. 8. 2.

² That these terms mean the same may be seen by a comparison of the following passages: fr. 4. 23. pr. fr. 40. D. 8. 2; fr. 13. § 7. D. 7. 1. and Const. 12. § 2. C. 8. 10.

³ See the passages cited in note 2. The views wherein this servitude consisted among the Romans are, however, conflicting. *Feuerbach*, in his *Civil. Vers.* Vol. 1, No. 1. regards it rather as a servitude of shade than of light, i. e., as a right to the shade afforded by a neighbor's house or wall to our land, whereby he could be prevented from removing it. See, *contra*, *Dabelow*, über die servitus luminum der Römer, Halle, 1804. And again, on the other hand, *Pachlig*, Diss. in qua *Feuerbachii de luminum servitute sententia contra Dabelowium*, Groningen, 1811. *Moser*, in his *Beiträge zur Röm. Gesetzkunde*, Stuttgart, 1815, is of opinion that this is a servitude of reflection, by virtue of which one's neighbor is obliged to suffer the sun's rays reflected from the white wall of one's building on his windows! Among other noteworthy writings on this subject-matter are *Griesinger*, de servitute luminum et ne luminibus officiatur, Leipsic, 1819; *Luden*, die Lehre von den servituten. § 24: *Fähne*, das Fenster- und Lichtrecht nach röm. gemeinem deutsche, preusz. und franz. R., Berlin, 1835, § 2-7.

⁴ Const. 12. § 3. C. 8. 10.

⁵ fr. 4. 11. pr. fr. 15. fr. 17. pr. § 1. fr. 22. 23. pr. fr. 31. D. 8. 2; fr. 16. D. 8. 4; fr. 15. D. 8. 5; and comp. fr. 10. D. 8. 2. with fr. 30. D. 7. 1.

⁶ fr. 3. 12. 15. D. 8. 2; § 2. I. 4. 6; fr. 5. pr. D. 39. 1. Respecting these servitudes, the opinions, especially those of the later writers, differ. See the works referred to in note 3. *supra*. As to the servitudes of light and prospect, the Roman names are at this day of no moment practically, as all depends on the purpose and manner of a servitude of this kind, and its extent.

servitude *ne luminibus aut prospectui officiat* is termed *jus luminibus aut prospectui officendi*.¹

7. The servitude *sterculinii* is the right of placing a dung-pit or something similar on one's own ground near a neighbor's house or land.²

8. The servitude *cloacæ mittendæ* is the right of having a sewer through the house or over the ground of one's neighbor.³

9. The servitude *fumi immittendi s. cuniculi balneari habendi* is the right of conducting off an intensely burdensome smoke, or other disagreeable vapor, through the chimney or over the ground of one's neighbor.⁴

2. Rustic Prædial Servitudes.⁵

§ 318. The principal rustic prædial servitudes that occur in the Roman law are :

1. The rights of way by land and by water,⁶ which are subdivided into—

a. The servitude *itineris*. This with the Romans gave the authority of passing over another's land on foot, on horseback, or of being carried over it in a sedan or litter.⁷

b. The servitude *actus*, which secured, in addition to the rights given by the foregoing servitude, that of driving cattle or of riding in a vehicle.⁸

c. The servitude *viæ*. This embraced all that was contained in the *iter* and *actus*, and also the right of dragging stones and timber over the way.⁹ If there were no special agreement respecting the width of the way the law provided that it should be eight feet in a right line (*in porrectum*), and at a turn (*in anfractum*) sixteen feet.¹⁰ A servitude of way may be granted by express agreement, so as to permit the party entitled to traverse the servient land in every direction and to change his way at pleasure.¹¹ But when there is no such express agreement the entitled party is restricted to a certain direction, which may be determined immediately on the establishment of the servitude. If this be not done, or if the parties cannot agree on it, it must be decided by the judge according to equity and with respect to the locality and the interests of both parties.¹² In Germany, in determining the nature

¹ fr. 2. D. 8. 2.

² fr. 17. § 2. D. 8. 5.

³ fr. 7. D. 8. 1; fr. 2. pr. D. 8. 3.

⁴ fr. 8. § 5-7. D. 8. 5.

⁵ Glück, Comm. Vol. 10, § 674-683.

⁶ Respecting the Roman rights of way see Biener, Diss. de differentiis itineris, actus et viæ genuinis, Leipsic, 1804; Götschen, Grundriss zu Pand-Vorles p. 147; Vangerow, Pand. § 341.

⁷ pr. I. 2. 3; fr. 1. pr. fr. 7. pr. fr. 12. D. 8. 3.

⁸ See in addition to the passages just cited fr. 4. § 1. fr. 13. D. 8. 1; fr. 2. D. 8. 6.

⁹ fr. 1. pr. fr. 7. pr. D. 8. 3.

¹⁰ fr. 8. fr. 13. §§ 2. 3. fr. 23. pr. D. 8. 3; fr. 6. in fin. D. 8. 6. See also Varro, de ling. lat. 6. 2, and Hugo, Rechtsg. p. 190.

¹¹ fr. 13. § 1. D. 8. 3; fr. 6. § 1. D. 8. 6.

¹² fr. 13. § 1. 3. D. 8. 3; fr. 9. D. 8. 1. When, however, the right of way was constituted by testament, and the testator did not prescribe the location of the

and extent of the various rights of way, it does not depend on the Roman names and principles of the servitudes of this description, but on the manner, where and for what purpose they were granted or acquired. Yet at the present day the Roman rule of law governs that the greater tacitly comprehends the less,¹ if it be not otherwise agreed.²

d. The servitude *navigandi*, or the right of crossing a water belonging to another in order to arrive at one's own land.³

2. The right of pasture (*servitus pascendi s. pascui*) is the right of pasturing one's cattle on another's land.⁴ This right tacitly includes that of *actus* so far as the latter is necessary to its exercise.⁵ Its extent in regard to the time of its exercise, as well as the kind and number of cattle, depends on the agreement in relation to it on making the grant. When no agreement has been made respecting the time, then—

a. The servitude in relation to meadows and fields can be exercised only at the time when they are fallow, *i. e.*, between harvest and seed-time, consequently after the crops have been gathered and the meadows mowed.⁶

b. In the absence of agreement as to kind, any kind of cattle for which the pasture is adapted may be pastured on it, but not such as would injure the land unusually.⁷

c. If the number be not limited, all the cattle belonging to the dominant land that can be supported through the winter by its produce may be pastured on it.⁸

d. The owner of the servient land, unless the contrary be agreed on, has a right of joint pasture (*jus compascendi*).⁹ But if the pasture on the servient ground be not sufficient for the cattle of both parties, or ceases to be so, the owner of the dominant land may nevertheless pasture the number of

way, then the heir may locate it as he pleases, so that he does not seriously injure the legatee: fr. 26. D. 8. 3. This passage originally referred to the *legatum per damnationem*.

¹ fr. 21. fr. 110. pr. D. 50. 17; pr. I. 2. 3; fr. 1. pr. fr. 7. pr. D. 8. 3.

² fr. 4. § 1. D. 8. 5; fr. 1. D. 34. 4.

³ fr. 23. § 1. D. 8. 3.

⁴ § 2. I. 2. 3; fr. 1. § 1. fr. 3. pr. fr. 4. fr. 6. § 1. D. 8. 3; *Kämpfe*, Diss. de servitute pascendi, Wittenberg, 1791; *Strampfer*, vom Hutrechte, Erlangen, 1798; *Münster*, vom Weidrechte, Hanover, 1804.

⁵ arg. fr. 3. § 3. D. 8. 3.

⁶ arg. fr. 9. D. 8. 1, "*civiliter modo*," that is, do as little injury in the exercise of his right as possible, and fr. 13. in fin. D. 8. 4.

⁷ *Lauterbach*, coll. Pand. lib. 8. tit. 3. § 10.

⁸ For the reason that a prædial servitude is to be confined to the necessities of the dominant land (see *supra*, § 315, div. 5): fr. 3. pr. combined with fr. 5. in fin. D. 8. 3.

⁹ arg. fr. 13. § 1. in fin. D. 8. 4; Const. 6. C. 3. 34. The *jus compascendi* is distinguished from the *jus compascui*. By the latter is understood that right of reciprocal pasturing which several owners grant to each other on their lands or the common of pasture. It does not, however, always occur as a servitude, but often as a mere *precarium*: *Hagemann*, Landwirthschafter. § 300-304.

cattle to which he is entitled by agreement, even though nothing should remain for the cattle of the servient land. But if there be no agreement as to the number of cattle, then the judge shall decide what number each may pasture, regard being had to the proportions of stock belonging to each farm.

3. To the servitudes that relate to the conducting and using of water belong—

a. The aqueduct, or the servitude *aquæ ducendæ*, *i. e.*, the right of conducting water to one's own premises from or through another's land, whether beneath, upon or above the surface of the earth.¹ As a general rule the party entitled can conduct the water only through pipes and not through stone channels,² and in a certain direction.³ The servitude may also refer to *aqua quotidiana* (daily), in which case the use of the water is not restricted to any part of the year; or only to *aqua æstiva* (summer), when it is restricted to the summer.⁴

b. The *aquæhaustus*, or the servitude *aquæ hauriendæ*, *i. e.*, the right of taking water from another's well or spring, in which the *iter* as far as it is necessary is tacitly embraced.⁵

c. The servitude *pecoris ad aquam appulsus*, or the right of leading one's cattle to water on the servient land, in which the *actus* as far as requisite is tacitly implied.⁶

d. The servitude *aquæ educendæ s. immittendæ*, or the right of leading off the water from one's own to another's land.⁷

4. There are many other servitudes, as, *e. g.*, the right of cutting wood in another's forest; the right of storing and keeping the produce of one's land in another's building; the right in working one's quarry to cast earth, stones and pieces of rock on one's neighbor's land and leave them there till they can be taken away; the right of having a hut on another's land for the enjoyment of the right of pasture,⁸ and the *jus cretæ eximendæ*, or the right to take clay from another's land; the *jus calcis coquendæ*, to calcine chalk on another's land; the *jus lapidis eximendæ*, to take stone from another's land; the *jus arenæ fodiendæ*, to dig in another's land, and similar others.⁹

¹ pr. I. 2. 3; fr. 1. pr. fr. 9. D. 8. 3; fr. 14. § 2. D. 8. 1; fr. 4. D. 43. 20; Cod. 11. 42; Hermann, Diss. de servitute aquæductus, Leipsic, 1803. The works on water rights cited in note 6, § 295, *supra*, are somewhat applicable here.

² fr. 17. § 1. D. 39. 3.

³ The direction is determined here on the same principles as in the rights of way: fr. 9. in fin. D. 8. 1; fr. 21. 22. 26. D. 8. 3; fr. 8. D. 3. 20.

⁴ fr. 1. §§ 2. 3. D. 43. 20. The use of water may also be limited by days, hours or measure: fr. 2. fr. 5. pr. D. 43. 20; fr. 2. §§ 1. 2. D. 8. 3.

⁵ § 2. 1. 2. 3; fr. 1. § 1. fr. 3. § 3. fr. 9. D. 8. 3; Walch, Diss. de aquæ hauriendæ servitute, Jena, 1754.

⁶ See the passages cited in the last note and fr. 4. fr. 6. § 1. D. 8. 3.

⁷ fr. 29. D. 8. 3; fr. 8. § 5. D. 8. 5.

⁸ fr. 6. § 1; fr. 3. §§ 1. 2; fr. 6. in fin. D. 8. 3.

⁹ § 2. I. 2. 3; fr. 1. § 1. fr. 5. § 1. fr. 6. D. 8. 3.

TITLE THIRD.

POSSESSION, ORIGIN AND END OF SERVITUDES.

I. OF THE QUASI-POSSESSION OF SERVITUDES.

§ 319. Servitudes according to the Roman law may be an object of the right of quasi-possession (§ 246, *supra*).

A. To acquire the possession of a servitude¹ it must be used with the intention to possess it (*animus quasi possendi*, § 252, *supra*). For which is required—

1. In personal servitudes, generally the detention of the servient thing.²

2. In prædial servitudes,

a. Legal possession of the dominant land.

b. And in addition, the use of such servitudes, when they permit recurring uses.³ In affirmative servitudes, which depend on the continuous condition of both neighboring lands, the existence of such condition,⁴ and in negative servitudes, either an agreement governing the servitude or the obedience to the prohibition of that which by virtue of the servitude may be prohibited.

B. The possession of a servitude is lost⁵ by the declaration of the intention not to possess it (*animus non possidendi*); thereby the enjoyment of the servitude becomes impossible. The latter occurs in personal servitudes by the loss of the detention,⁶ and in prædial servitudes by the total annulment of the condition of neighboring lands on which they depend, and by the restoration of the condition by virtue of which the servitudes need not be suffered, and if they depend on recurring uses of them, by obstructions to such uses.⁷

II. OF THE CREATION OF SERVITUDES.

A. WHO CAN GRANT THEM.

§ 320. As servitudes are in their nature component rights of property detached from the thing itself, and belonging to another than the owner of the thing as independent rights, it follows—

1. That strictly speaking only the true owner of a thing can burden it with a servitude.⁸ Accordingly if it be granted by one who is not the true owner, the grantee acquires not the right of servitude (*jus servitutis*) itself, but only the right in the nature of possession (*juris quasi possessio*).⁹

¹ *Savigny*, *Recht des Besitzes*, § 45.

² *fr.* 3. *pr.* D. 7. 1.

³ Naturally with the view to exercise a right: *fr.* 7. D. 43. 19; *fr.* 25. D. 8. 6.

⁴ *fr.* 20. *pr.* D. 8. 2. *Comp.* *fr.* 8. § 3. D. 8. 5.

⁵ *Savigny*, § 46.

⁶ Respecting cases in which the detention is transferred to another, *comp.* *fr.* 12. § 2. D. 7. 1. with *fr.* 29. *pr.* § 1. D. 7. 4.

⁷ *fr.* 6. *fr.* 20. *pr.* D. 8. 2.

⁸ *fr.* 6. *pr.* in *fin.* *fr.* 8. D. 8. 4.

⁹ *Comp.* §§ 246, 252, *div.* 2, § 283, note 1, *supra*, and § 325, *infra*. Respecting the

2. One who has only a revocable ownership in a thing cannot burden it with a servitude for a longer time than the duration of his right.¹

3. A joint owner cannot for himself alone burden the thing held jointly with an indivisible servitude, such as a prædial servitude.²

4. When one has only the naked ownership of a thing, because another has the usufruct of it, he may for himself alone burden the thing with such servitudes as will not injure the usufructuary; but he cannot impose a servitude on the thing, even with the consent of the usufructuary, which will impair the usufruct.³

5. The emphyteuta and superficiary (*infra*, note 3, p. 259) may impose servitudes on the thing without the assent of the owner (*dominus*); but these are protected only by *utiles* actions and exceptions, and are annulled when the superficiary or emphyteutical right ceases because of its limited nature.⁴

B. WHO CAN ACQUIRE SERVITUDES.

§ 321. A personal servitude may be acquired—

1. By any one who has the general capacity of acquiring rights, but a prædial servitude can be acquired only by the true owner of the land, because it is to be regarded as an accession to the land.⁵

2. He who has the mere right of property in a thing may acquire a servitude for it without the consent of the usufructuary, but then the usufructuary has the advantage of it as long as the usufruct lasts.⁶

3. A joint owner cannot for himself alone acquire a servitude for the joint land, because he is not the owner of the whole land, and a servitude from its indivisibility cannot be acquired for a part.⁷

4. The owner of a piece of land cannot have established for himself and his neighbor a servitude; in such case he acquires it for himself only.⁸

C. HOW SERVITUDES ARE ACQUIRED.

§ 322. Servitudes may be acquired—

1. By convention. This, according to the ancient civil law, was to be occasionally occurring *Publiciana* action, see § 324, *infra*, and respecting another exception from the rule of strict law, see div. 5, this section.

¹ fr. 11. § 1. D. 8. 6; fr. 105. D. 35. 1, because of the rule *resoluto jure concedentis, resolvitur jus concessum*. See § 270, *supra*.

² fr. 2. D. 8. 1; fr. 11. 34. pr. D. 8. 3; fr. 6. § 1-3. fr. 18. D. 8. 4. The joint owner can only grant to some one a usufruct to his undivided part: fr. 10. D. 7. 9.

³ fr. 15. § 7. fr. 16. D. 7. 1. See *Glück*, Comm. Vol. 9, p. 42, *seq.*; *Vangerow*. Pand. § 338, Rem. 2, No. 3; *Böcking*, Instit. § 164, note 22.

⁴ fr. 1. pr. D. 7. 4; fr. 1. § 9. D. 43. 18. See § 327, note 6, *infra*.

⁵ § 3. I. 2. 3; fr. 1. § 1. D. 8. 4. Hence, a mere *bonæ fidei* possessor of land acquires only a *bonæ fidei* possession of the servitude granted to him for the benefit of the land.

⁶ fr. 15. § 7. D. 7. 1; fr. 1. pr. fr. 5. § 1. D. 7. 6.

⁷ fr. 19. 34. pr. D. 8. 3; fr. 5. fr. 6. § 1-3. fr. 18. D. 8. 4; fr. 8. § 1. D. 8. 1; fr. 30. § 1. D. 8. 2.

⁸ fr. 5. fr. 6. pr. in f. fr. 8. D. 8. 4.

embodied in the form *in jure cessio* (the acquisition was effected by a fictitious action to which the defendant made no defence), and whose place in servitudes in land (*rusticæ*)¹ could also be substituted by the *mancipatio* (a fictitious sale by scales and weight).² In the case of provincial lands these forms were not permitted, and in general they could not have civil law servitudes. Hence in this case pacts and stipulations were used as substitutes.³ These were often mentioned by the classical jurists without special reference to provincial lands,⁴ and the quasi tradition of a servitude is protected by the prætor.⁵ In the Justinian law the *in jure cessio* and the *mancipatio* have ceased to exist, not only in relation to servitudes, but wholly,⁶ and there are no longer any specialties in relation to servitudes in provincial lands. Beyond doubt negative servitudes may be created by simple convention;⁷ but whether in affirmative servitudes a simple agreement is sufficient to establish the right of servitude, and with it the real action for enforcing it, or whether a quasi transfer of the servitude or the exercise of the same by the sufferance of the owner is requisite in addition thereto, is a question much disputed; the first branch of this proposition appears to have the best reasons for its support.⁸

2. By disposition of last will (*servitus legata*), where the right of servitude is *ipso jure* acquired⁹ at the moment of the acquisition of the inher-

¹ At least with the four oldest, *iter, actus, via* and *aqueductus*, and with the *aquæhaustus*: *Zachariæ v. Lingenthal*, Über die unterschied zwischen servitudes rust. und urb., Heidelberg, 1844, p. 11, *seq.*

² Gaius, II. § 28–32; Ulpian, XIX. §§ 1. 9. 11.

³ Gaius, II. § 30–32.

⁴ fr. 3. pr. fr. 25. § 7. D. 7. 1; fr. 20. D. 8. 1. See also fr. 2. § 5. fr. 4. § 1. fr. 38. § 10–12. fr. 49. § 1. fr. 85. § 3. fr. 111. D. 45. 1; fr. 33. pr. D. 8. 3.

⁵ fr. 11. § 1. D. 6. 2; fr. 25. § 7. D. 7. 1; fr. 1. pr. D. 7. 4; fr. 20. D. 8. 1; fr. 1. § 2. D. 8. 3; fr. 16. D. 8. 5. See fr. 3. pr. D. 7. 1.

⁶ In many of the passages of the Corpus juris respecting the granting of servitudes the *in jure cedere* was therefore changed to *cedere* or *concedere*. It is interesting to observe the change that the expressions of Gaius cited in notes 2 and 3 have suffered in Justinian's Institutes, namely, in § 4. I. 2. 3. and in § 1. I. 2. 4.

⁷ There is also no doubt that in the transfer of property by tradition one may by the Justinian law reserve to himself a servitude by simple agreement (*excipere, deducere*), though formerly it could only have been done by the transfer through *in jure cessio* or *mancipatio*. On the ancient law see Gaius, II. § 33; *Fragm. Vat.* § 47–50, and on the more modern law, fr. 32. 36. § 1. D. 7. 1; fr. 19. D. 8. 1; fr. 35. D. 8. 2; fr. 8. D. 8. 4.

⁸ According to the earlier opinion tradition of the servitude was necessary for the acquisition of the *jus servitutis*, especially because of the Const. 20. C. 2. 3; fr. 3. pr. D. 44. 7. and the passages cited in note 5. But according to a more modern opinion, in consequence of the passages of the Institutes cited, and fr. 3. pr. D. 7. 1. compared with Gaius, and in consequence of other passages, the real right of a servitude may be granted by *pacta et stipulationes*, without *quasi traditio*: *Savigny*, vom Besitz, pp. 577, 602. The latter view is, however, severely contested, and has elicited great discussion between an array of writers for and against it.

⁹ The point of time of acquisition is defined in §§ 767, 768, *infra*.

itance.¹ The tacit grant of a servitude by a convention or testament is to be understood only when a thing alienated or devised could not exist or the principal right to which the servitude is accessory could not be exercised without the servitude.²

3. By adjudication in the three actions for division of things.³

4. By prescription. Long after the *usucapio, quæ servitutum constituebat*, respecting which we have no certain information,⁴ was by the *lex Scribonia*⁵ abolished,⁶ the rule was established by judicial usage that by the long continuous quasi possession, or long use of the servitude (*longa quasi possessio s. diuturnus usus servitutis*),⁷ not only an exception was founded, but also an *utilis in rem* action.⁸ To which is requisite that one shall exercise any kind of servitude⁹ in a thing which is capable of being acquired by ordinary property prescription¹⁰ for ten years, or, *inter absentes*, twenty years,¹¹ as a right, such exercise to be neither forcibly, secretly nor by courtesy (*nec vi, nec clam, nec precario*).¹² Whether by the Roman law it depended on *bona fides* is disputed.¹³ When the requisites to this prescription are lacking, then the thirty or forty years extinctive prescription of the action *negatoria* in some measure supplies the place of such requisites; and when the possession is acquired *bona fide*, there may usually be an extraordinary acquisitive prescription, as in the case of corporeal things.

5. Usufruct in many cases is founded immediately on express law,¹⁴ and prædial servitudes may likewise be said to be founded on law when under-

¹ § 4. l. 2. 3.; § 1. l. 2. 4.; fr. 3. pr. fr. 6. pr. D. 7. 1. To found a usucapion possession and the action *Publiciana* a tradition of the servitude is also necessary here. Respecting the *servitus legata* in general. Dig. 33. 2. 3.

² fr. 1. D. 33. 3.; fr. 1. § 14. D. 7. 6.; fr. 15. § 1. D. 33. 2.; fr. 44. § 9.; fr. 51. § 3. D. 30.; fr. 20. D. 8. 5. comp. with fr. 10. fr. 34-39. D. 8. 2.; fr. 3. fr. 6. pr. fr. 7. D. 8. 4.; fr. 30. D. 7. 1.; fr. 26. D. 39. 2.; *Westphal*, de servitutibus. § 541. and *Glück*, Comment. Vol. 9. pp. 70, 77-82.

³ fr. 6. § 1. D. 7. 1. fr. 16. § 1. fr. 22. § 3. D. 10. 2.; fr. 6. § 10. D. 10. 3.; fr. 10. D. 7. 9.

⁴ fr. 4. § 39. D. 41. 3. See fr. 14. pr. D. 8. 1. See *Glück*, Comm. Vol. 9. p. 109, seq.

⁵ fr. 4. § 29. D. 41. 3. The age of this *lex* is unknown: *Glück*, Comm. Vol. 9. p. 111, seq., note 2.

⁶ Compare *Paul*, sent. R. l. 17. § 2.

⁷ Also termed *longa possessio in prædialibus*, *longa prædialis* and *longa æmptoria communis*.

⁸ fr. 10. pr. D. 8. 5.; fr. 1. § ult. D. 39. 3.; fr. 5. § 3. D. 43. 19.; *Const.* l. 1. C. 3. 34.

⁹ *Const.* l. 1. in fin. C. 7. 33.

¹⁰ Property of churches and benevolent institutions cannot be so acquired: *Novel* 131. c. 6. See *Const.* 3. C. 2. 41.; *Const.* 3. C. 11. 65.

¹¹ *Paul*, sent. rec. V. 3. a. § 5.; *Const.* 2. C. 3. 34.; *Const.* 12. in fin. C. 7. 33.

¹² fr. 11. pr. D. 63.; fr. 1. § ult. D. 39. 5.; *Const.* l. 1. C. 3. 34.

¹³ Respecting the canon law see § 213, note 6. *supra*.

¹⁴ The single cases of the grant of a usufruct by law are mentioned *infra* §§ 309, 361. *fr.* 1. § 163. *fr.* 3. § 616. and at the end of § 473.

stood in the sense of the restrictions of law on property in a thing for the benefit of another. (See § 295, *supra*.)

III. EXTINCTION OF SERVITUDES.¹

§ 323. Aside from laws or individual action servitudes from their general nature become extinct²—

1. By either an express or implied renunciation (*remissio*) on the part of the party entitled to them.³

2. By confusion. This occurs in prædial servitudes, when both the dominant and servient land become the property of one owner; but the servitude continues when only part of the servient land is acquired by the dominant owner, or when only part of the dominant land is acquired by the servient owner.⁴ Personal servitudes are also extinguished by confusion, when the party entitled to them acquires the property of the thing; this in the case of a usufruct is termed consolidation.⁵ A confusion in either personal or prædial servitudes, which from its beginning is merely temporary, does not extinguish the servitude, for on the cessation of the confusion the servitude revives.⁶

3. When the right of him who granted the servitude was at the time of the grant revocable,⁷ and his right has ceased.

¹ Dig. 7. 4; 8. 6; Paul, sent. rec. III. 6. § 28–33.

² Thus, the father's legal usufruct in his children's property in general ceases with his paternal power: § 2. I. 2. 9. In like manner a servitude created by agreement or devise may be made to depend on a certain condition, or it may be limited to a certain time. (See § 315, note 12, *supra*); fr. 4. pr. D. 8. 1. comp. with fr. 15. D. 7. 4; Const. 5. C. 3. 33. Respecting the usufruct, however, the following provisions are made by Const. 12. C. 3. 33:

1. When the usufruct has been devised to A. till B. shall attain a certain age, and B. dies before attaining that age, the usufruct shall nevertheless continue till the time when B. would have attained that age had he lived, unless the usufructuary himself previously dies.

2. When the testator has made the duration of the usufruct depend on some other uncertain event concerning the person of another, thus: a devise of a usufruct to A. till B. shall again attain the use of his understanding, and B. dies before the occurrence of the event, the usufruct shall be considered as one granted for the lifetime of the usufructuary.

³ By the ancient law the form had to be the *in jure cessio* or the *mancipatio* when a servitude was to cease in this way *ipso jure*: Gaius, II. §§ 29. 30; Paul, S. R. III. 6. § 30. A simple convention founded only an exception: fr. 4. D. 8. 1; fr. 4. § 12. D. 44. 4. By the Justinian law a simple convention has the effect which the *in jure cessio* had previously: § 3. I. 2. 4. See fr. 64. 65. D. 7. 1.

⁴ fr. 1. D. 8. 6; fr. 30. D. 8. 2; comp. with fr. 8. § 1. D. 8. 1; fr. 19. fr. 34. pr. D. 8. 3; fr. 5. fr. 6. § 1–3. fr. 18. D. 8. 4.

⁵ § 3. I. 2. 4; fr. 3. § 2. fr. 6. pr. D. 7. 2; fr. 78. § 2. D. 23. 3; fr. 17. D. 7. 4; fr. 57. pr. D. 7. 1.

⁶ fr. 9. D. 8. 4; fr. 18. D. 8. 1; fr. 57. D. 24. 3; fr. 7. pr. D. 23. 5.

⁷ fr. 16. D. 7. 4; fr. 11. § 1. D. 8. 6; fr. 105. D. 35. 1. See § 267, *supra*.

4. By the destruction of the servient object;¹ yet on its restoration, the former servitude revives.²

5. By the destruction of the subject.³ Hence personal servitudes expire with the death of the party entitled to them,⁴ and prædial servitudes with the destruction of the dominant land, though here also the servitude revives with the restoration of the dominant land.⁵

6. By extinctive prescription. According to the Roman law, personal⁶ and prædial servitudes through continuous non-user,⁷ and urban servitudes through usucapion *libertatis*⁸ (free from servitude), *ipso jure* cease to exist. For the cessation of the latter it is requisite when the servitude has not been used by the dominant owner there should be continuous legal possession of the servient thing, and continuous suspension of the condition necessary to the exercise of the servitude.⁹ According to Justinian¹⁰ the time of prescription of all kinds of servitudes, including personal servitudes in movable things,¹¹ was ten years *inter præsentes*, and twenty years *inter absentes*.

¹ § 3. I. 2. 4; fr. 10. § 2-4. fr. 12. fr. 30. fr. 31. D. 7. 4; fr. 20. § 2. D. 8. 2; fr. 2. D. 7. 1.

² fr. 14. pr. D. 8. 6; fr. 23. D. 7. 4; fr. 36. pr. D. 7. 1. Many understand this as applying only to prædial servitudes; but see fr. 23. D. 7. 4.

³ This is the usual expression, though in prædial servitudes it is not wholly correct, because in that case it is not the dominant land that is the proper subject of the right of servitude, but the provisional owner.

⁴ § 3. I. 2. 4; pr. I. 2. 5; fr. 3. § 3. D. 7. 4; Const. 3. pr. Const. 12. pr. Const. 14. C. 3. 33. A servitude granted to a corporation becomes extinct in one hundred years "quia is finis vitæ longævi hominis est": fr. 56. D. 7. 1. It is remarkable that, according to the Roman law, the usufruct and use became extinguished by *maxima*, *media* and *minima capitis diminutio* of the party entitled; but the Const. 16. § 2. C. 3. 33. altered the rule as to the effect of the *minima diminutio*: § 3. I. 2. 4; fr. 1. D. 7. 4; Const. 16. 17. C. 3. 33. This was not the case with a dwelling, "because this consisted rather in a fact than in a right": fr. 10. pr. D. 7. 8; fr. 10. D. 4. 5, nor in the case of labor of slaves: fr. 2. D. 7. 7; fr. 2. D. 33. 2.

⁵ fr. 20. § 2. D. 8. 2.

⁶ Habitation and work are excepted herefrom: fr. 10. pr. D. 7. 8. fr. 2. D. 33. 2. Respecting the usufruct *alternis annis legatus*, see fr. 28. D. 7. 4; fr. 13. D. 33. 2.

⁷ fr. 38-40. D. 7. 1; fr. 28. 29. D. 7. 4; § 3. I. 2. 4; fr. 6. D. 8. 2; fr. 18. D. 8. 3; fr. 7. D. 8. 6. This applies only to rights of way, to the servitudes of aqueducts, and the use of water and personal servitudes; to all other usucapion is necessary.

⁸ fr. 6. D. 8. 2.

⁹ fr. 6. 7. 32. pr. D. 8. 2; fr. 18. § 2. D. 8. 6; fr. 4. § 29. D. 41. 3.

¹⁰ Formerly it was two years, and in personal servitudes in immovable things one year: Paul, sent. rec. I. 17; III. 6. § 30. Compare the interpolated fr. 4. § 27. D. 41. 3. Justinian extended the time in the case of the usufruct by the Const. 16. § 1. C. 3. 33. and then by Const. 13. C. 3. 34. in all other servitudes. These constitutions make no change in the ancient distinction between loss by simple non-user and *usucapio libertatis* (non-user by the dominant owner). The views respecting this distinction are very conflicting. See Glück, Comm. Vol. 9, § 641, Vol. 10, § 689; Unterholzner, Verjährungslehre, Vol. 2, § 217-234.

¹¹ See Unterholzner, *supra*, § 223.

TITLE FOURTH.

ACTIONS RELATING TO SERVITUDES.

I. PETITORY ACTIONS.¹

§ 324. The actions relating to servitudes are either petitory or possessory. To petitory actions belong—

1. The action *confessoria*, *s. vindicatio servitutis*, which is used for enforcing a servitude.² It may be instituted by a claimant of a servitude who can prove that it belongs to him or his land.³ It may be instituted against every one who disturbs the plaintiff in the exercise of his right to the servitude, its object being for the recognition of the servitude, damages, and, when necessary, for security against the disturbance of the right (*de non amplius turbando*).⁴

2. The action *negatoria*, *s. vindicatio libertatis*, which is for the enforcement of the freedom of a thing from a servitude.⁵ This action is employed by the owner of a thing against any one who claims a servitude in the thing.⁶ It is naught else than the *rei vindicatio* (action *in rem* in a limited sense), to remedy the partial infringement of the ownership by the assumption of a servitude, and hence its object is for the recognition of the natural freedom of the thing, to obtain security against future disturbance and compensation for damages.⁷ The plaintiff must here prove his ownership,⁸ and the defendant his servitude, even though he be in possession of it.⁹

3. A servitude, or the freedom of the ownership from a servitude, may be enforced by the *Publiciana in rem* action.

a. When this action is instituted to enforce a servitude, the plaintiff is not required to prove that the right of servitude belongs to him, but only that he has acquired the possession of the servitude by tradition, or sufferance (*patentia*) of the owner.¹⁰

¹ Dig. 7. 6–8. 5; § 2. I. 4. 6; *Donellus*, Comm. jur. civ. Lib. 11, c. 15. 16; *Glück*, Comm. Vol. 10, § 685–687.

² See note 5.

³ fr. 2. § 1. fr. 10. § 1. D. 8. 5. On the question, To what extent may the usufructuary of land entitled to a servitude complain because of such servitude? see fr. 1. pr. fr. 5. § 1. D. 7. 6; fr. 2. D. 39. 1; fr. 1. § 4. D. 43. 25.

⁴ fr. 2. fr. 5. § 5–7. D. 7. 6; fr. 4. § 2. fr. 6. § 2–7. fr. 7. fr. 10. § 1. fr. 12. fr. 15. D. 8. 5.

⁵ The terms *confessoria* and *negatoria s. negativa* action arose from the positive and negative formation of the *intentio* in the former *formula actionum*.

⁶ fr. 2. pr. D. 8. 5. How far it may be employed in relation to other disturbances and wrongs to the property is doubtful: fr. 8. § 5. fr. 11. 13. 14. 17. pr. D. 8. 5; fr. 2. D. 43. 27; fr. 6. § 2. D. 47. 7.

⁷ See the passages cited in note 4.

⁸ fr. 5. pr. D. 7. 6. See Const. 10. C. 4. 24.

⁹ This is a greatly contested question, especially because of § 4. I. 4. 15. fr. 8. § 3. D. 8. 5. fr. 15. D. 39. 1. and fr. 7. § 5. D. 40. 12. See *Glück*, Comm. Vol. 10, § 687.

¹⁰ fr. 11. § 1. D. 6. 2; fr. 1. § 2. D. 8. 3. See fr. 18. D. 20. 1.

b. When this action is instituted for the freedom of the thing, the plaintiff is not required to prove his actual ownership of the thing, but only that he has acquired possession of it *ex justa causa* by tradition.

II. POSSESSORY ACTIONS.

§ 325. The possessory remedies applicable to servitudes are :

A. For personal servitudes, the usual interdicts *retinendæ* and *recuperandæ possessionis* (§ 259-264, *supra*).¹

B. With respect to prædial servitudes, a distinction must be made between affirmative and negative servitudes.

1. In the case of those affirmative servitudes which are exercised by disconnected independent acts (servitudes *discontinuæ*), such as the servitudes *itineris*, *viæ*, *actus*, *aquæductus*, *aquæhaustus*, etc., the ordinary possessory interdicts are not applicable, and the interdicts especially provided for them must be employed.² These especial interdicts are, the interdicts *de itinere actusque privato*, for maintaining the exercise of a right of way; the interdict *de itinere actusque reficiendo*, for protection in repairing a way;³ the interdict *de fonte*, for protecting the exercise of the right to take water from another's spring or pond, and the interdict *de fonte reficiendo*, for protecting the reparation of a spring;⁴ the interdict *de aqua quotidiana et æstiva*, for the protection of the use of an aqueduct, provided there exist the necessary arrangement for it,⁵ and the interdict *de rivis*, for protection in repairing the same,⁶ and the interdict *de cloacis*, for protecting the cleansing and reparation of a drain or sewer.⁷

2. In relation to those affirmative servitudes which are exercised without recurring acts, by a continuous arrangement or condition, the interdict *uti possidetis* is employed.⁸

3. The possession of negative servitudes, according to the Roman law, is not protected by interdicts.⁹

¹ fr. 4. D. 43. 17; fr. 3. §§ 13. 14. 16. fr. 9. § 1. D. 43. 16; fr. 60. pr. D. 7. 1; fr. 2. pr. § 3. D. 43. 26.

² Savigny, vom Besitz, § 46.

³ fr. 1. pr. fr. 3. § 11. D. 43. 19; fr. 4. § 5. D. 8. 5. Respecting the interdict *de itinere actusque privato*, see Albert, über dem Besitz unkörperlichen sachen, Leipzig, 1826, and Althof, das interdictum de itinere actusque privato, Rinteln, 1836.

⁴ Dig. 43. 22.

⁵ Dig. 43. 20.

⁶ Dig. 43. 21.

⁷ Dig. 43. 23. comp. with fr. 1. pr. D. 43. 17. Here quasi possession of the servitude is not required, but only the existence of the *cloaca*. Respecting this interdict, and the interdict *de cloacis publicis*, as also the *cloacæ* in Rome, see Schmidt (v. Ilmenau), in the Journal für Geschicht. Rechtswiss. Vol. 15, No. 3.

⁸ fr. 8. § 5. D. 8. 5; fr. 3. § 5-7. D. 43. 17. This in general is applicable to affirmative urban servitudes, but never to a *cloaca*: fr. 1. pr. fr. 3. § 11. D. 43. 19. Respecting all these interdicts, see Savigny, vom Besitz, §§ 45, 46.

⁹ Savigny holds that the interdict *uti possidetis* may also be employed here; but see fr. 5. § 10. D. 39. 1.

CHAPTER IV.

EMPHYTEUSIS.

SOURCES.—§ 3. I. 3. 24. (25); Dig. VI. 3; Cod. Theodos. X. 3; Cod. Just. IV. 66.

LITERATURE.—*Cujas*, Recit. solemn. in tit. Cod. de jure emphyteutico; *Donellus*, Comm. jur. civ. Lib. 9. c. 13–15; *Jani A. Costa*, Præl. in tit. Cod. de jure emphyteutico. In præl. in illustr. quosd. tit., *A. Voorda*, edit. p. 346; *Galvanus*, de usufr. cap. 27. § 5; *Madihn*, de vera indole agrorum vectigalium secundum juris Rom. doctrinam, Berlin, 1773; *Groscurd*, de jure emphyteutico, Göttingen, 1803; *Kluppel*, de jure emphyteutico, Groningen, 1807; *Raupp*, de jure emphyteutico, Leyden, 1807; *Faure*, de emphyteusi ex jure Romano, Groningen, 1819; *Glück*, Comm. Vol. 8. § 600–619; *Gesterding*, vom Eigenthum, p. 405–444; *Savigny*, vom Besitz, p. 120, seq.; *Nothomb*, Spec. de historia juris emphyteutici apud Romanos, Liege, 1826; *Verloren*, Diss. de jure emphyteutico, Utrecht, 1826; *Tigerström*, über das frühere Verhältnisz des Rechts am ager vectigalis, Greifswalde, 1828; *Birnbaum*, De rechtliche Natur der Zehnten, Bonn, 1831, p. 60, seq.; *Muehler*, De jure emphyteutico transferendo, Berlin, 1835; *Vuy*, De originib. et natura juris emphyteutici Romanor. Heidelberg, 1838; *Schmid*, Handb. des gem. bürgerl. Recht. Vol. 2, § 20–24.

I. NATURE OF EMPHYTEUSIS.

§ 326. *Emphyteusis* is the alienable and inheritable real right¹ by which one is entitled to enjoy another's land as his own property, and to dispose of its substance as far as can be done without deteriorating it. This right is granted on condition that the grantee will cultivate and improve it, and pay yearly, or at some other specified period, a fixed sum (*canon, pensio, vectigal, redditus*) for it. The owner of the thing who grants such a right to another is termed *dominus emphyteuseos*, and the grantee is termed *emphyteuta*, and the thing granted, *ager vectigalis s. emphyteuticarius*, or *emphyteusis*, and, at the present day, also hereditary lease farm or fee farm.²

II. RIGHTS OF THE EMPHYTEUTA.

§ 327. The *emphyteuta*, without being owner of the thing, has nearly all the rights of an owner.³ Thus he has—

¹ It arose out of the right of the lessee of an *ager vectigalis*, especially of a city. The terms *emphyteusis*, *prædium emphyteuticarium* and similar terms were originally used only for the emperor's property. For the history of this real right, see *Vuy*, *supra*. and *Puchta*, Inst. Vol. 2, § 245.

² With respect to the modern hereditary lease or fee farms, see *Buri*, Bauerngütern. Gieszen, 1769, with additions by *Runde*, 1789; and see also *Schmid*, *supra*. § 29–33.

³ For this reason, and because the Roman law allows the *emphyteuta* an action *utiles in rem*, the glossators termed his right in the thing *dominium utile*, while the ownership which remained with the owner they termed *dominium directum*, because as the true owner he had the *rei vindicatio*. But *dominium utile* must not be under-

A. The full right of enjoyment, consequently the right of possessing the thing and of reaping all its products, in which he acquires irrevocably the property, not only by their perception, but simply by their separation.¹ He acquires no property in the accretions, but he beyond doubt has an emphyteutical right in them.² He has no claim to treasure trove except as finder.³

B. The right of disposing of the thing itself. This depends on the special agreement made at the time of the grant. If there be no special agreement the *emphyteuta* may—

1. Dispose of the substance of the thing, and make any change in it that will not deteriorate it.⁴

2. Transfer the exercise of this right to another, and alienate *inter vivos* or *mortis causa* the emphyteutical right itself (or, as it is usually termed, his improvements, *meliorationes*),⁵ whence he is also entitled to mortgage the thing and to burden it with servitudes, without the consent of the owner.⁶ He must request such consent only when he wants to sell his right, as the owner has the right of pre-emption if he will give the price offered by a third party. The *emphyteuta*, therefore, must inform him of the intended sale, and within two months after such notice the owner must declare whether he will exercise his right of pre-emption. If he does not declare his intention within that period the *emphyteuta* may sell without his consent, but the purchaser must possess the qualities requisite for the proper cultivation and management of the emphyteutical estate.⁷

stood to signify true ownership, but only a right in another's thing (*jus in re aliena*), which in its extent and effect nearly resembles ownership: C. H. Lang, *Comm. de dominio utilis natura, indole et historia, ejusque in jure Romano et Germano vestigia*, (Göttingen, 1793. The distinction between *dominium directum* and *utile*, which has been so frequently misunderstood, is most accurately defined by Thibaut in his *Versuchen*, Vol. 2, No. 3, and in his *Civilistische Abhandlung*, No. 11; and by Eichhorn, *Klin. Deutsche Privatrecht*, § 160. The old theory of a divided ownership (super and subownership) is still maintained by G. M. Weber in his *Handbuch des Lehenrechts*, Vol. 1, p. 14, and Glück, *Comm.* Vol. 8, §§ 577, 600.

¹ fr. 25. § 1. D. 22. 1.

² arg. fr. 10. § 1. fr. 32. fr. 65. D. 23. 3.

³ arg. fr. 7. § 12. D. 24. 3; arg. fr. 1. D. 43. 9; Thibaut, *Civil. Abh.* No. 11, note 3. They who attribute to the *emphyteuta* actual ownership naturally have a different opinion, such as Glück, *Comm.* Vol. 8, p. 398; but there are also some who attribute to him only a *jus in re*, such as Malblanc, *Princ. jur. Rom.* § 415.

⁴ Auth. *Qui rem.* C. 1. 2; Novel 120. c. 8.

⁵ Const. 3. C. 4. 66; § 3. I. 3. 24. (25); fr. 71. §§ 5. 6. D. 30; Const. 1. 3. C. 11. 70.

⁶ fr. 16. § 2. D. 13. 7; fr. 1. pr. D. 7. 4; Thibaut, *Versuche*, Vol. 2, *Abh.* 15. No. 1; Buchholz, *Versuche*, No. 13. If, however, the land reverts to the owner (*dominus emphyteuticus*) by virtue of the agreement at the establishment of the *emphyteuta*, all servitudes and mortgages imposed on the land by the *emphyteuta* without the owner's consent are extinguished: fr. 31. D. 20. 1. But this is not the case when the owner reacquires the land by his right of pre-emption (*jure protimiseos*): Buchholz, *Jur. Abhandl.* p. 316, note 25.

⁷ Const. 3. C. 4. 66.

3. At the death of the *emphyteuta* the *emphyteusis*, whether ecclesiastical or secular, regularly descends to his heirs, whether testamentary or intestate.¹

4. The *emphyteuta* has, for the enforcement of his rights, an action *utilis in rem* against every one, even the owner himself.²

III. DUTIES OF THE EMPHYTEUTA.

§ 328. The obligations imposed on the *emphyteuta* when there has been no special agreement to the contrary are as follows:

1. He must bear all public burdens and taxes that are imposed on the thing.³

2. He must improve the thing or at least manage it in such a manner as to prevent its deterioration.⁴

3. He must pay the rent (*canon*) agreed on, at the time specified, without demand.⁵

4. When the emphyteutical right is transferred by the *emphyteuta* to a several successor, whether by gift, devise, exchange or sale, there must be paid to the owner (*dominus*) for his acceptance of the new *emphyteuta* the fiftieth part of the purchase money, or in case there was no sale, of the true value of the thing, to be determined by experts (*quingagesima pars pretii vel æstimationis*, now termed *laudemium*, fine for alienation).⁶ Such *laudemium* is not payable by the heirs of the *emphyteuta*, and if it has not been otherwise agreed must be paid by the new *emphyteuta*. But such *laudemium* is payable only when the *dominus* has recognized the new *emphyteuta*, but not when he has refused so to do and has persisted in such refusal for two months after the notice was given to him.⁷

IV. ACQUISITION OF EMPHYTEUSIS.

§ 329. An emphyteutical right may be acquired by a grant from the actual owner of the land by means of a convention⁸ accompanied by a delivery of the thing. Whether there are other modes of acquisition is much disputed. The sources give no information thereon.⁹ But it is the common

¹ Novel 7. c. 3. taken in connection with Novel 120. c. 6. § 1. The emphyteutical rights may be transferred by devise: fr. 71. §§ 5. 6. D. 30.

² fr. 1. § 1. D. 6. 3; fr. 12. § 2. D. 6. 2.

³ Const. 2. C. 4. 66; Const. 2. C. 10. 16.

⁴ Novel 120. c. 8. Hence he must return it in as good condition, at least, as it was when he received it, and he is not entitled to compensation for improvements in case he should be deprived of it: Const. 2. C. 4. 66; Novel 7. c. 3. § 2; Novel 120. c. 8.

⁵ § 3 I. 3. 24. (25); Const. 2. C. 4. 66; *Thibaut*, Versuche, Vol. 1. Abh. 15, No. 3.

⁶ Const. 3. C. 4. 66; *Voet*, Comm. ad Pand. Lib. 6. tit. 3. § 26-35; *Schröter*, non der Lehenwaare, 2 parts, Berlin and Stralsund, 1789; *Glück*, Comm. Vol. 8, § 611-614.

⁷ Const. 2. C. 4. 66; *Buchholtz*, Jur. Abh. p. 318.

⁸ Respecting the emphyteutical contract see § 418, *infra*.

⁹ See, however, note 1, p. 262.

opinion that like other real rights it may be immediately acquired by last will of the owner. Many are of opinion that it may be acquired by prescription when the *emphyteusis* was originally granted by a non-owner, and has been exercised by the *emphyteuta bona fide* for ten or twenty years, provided that the ownership of the thing may be acquired by prescription in this period.¹ When, however, a person possesses land *animo emphyteutæ* for a long period continuously, for which he has not received a grant of an emphyteutical right from any one, and pays rent for it, the acceptance of the rent by the owner of the land is a tacit grant of the *emphyteusis*, which is thus acquired without regard to the efflux of the time of prescription.

V. EXTINCTION OF EMPHYTEUSIS. .

§ 330. The *emphyteusis* becomes extinct—

1. When its object wholly ceases to exist.²
2. When the grantor had only a revocable or temporary ownership of it, on the cessation of such ownership.³
3. By the efflux of time or the performance of the condition on which the, ending of the grant depended.
4. When the *emphyteuta* surrenders his right to the owner.⁴
5. By confusion.
6. When the *emphyteuta's* real rights are lost by prescription.⁵
7. When the *emphyteuta* dies without a successor.⁶
8. When the *emphyteuta* forfeits his estate as a punishment, as,
 - a. When he wastes the land.⁷
 - b. When he omits to pay the rent for two years in the case of an ecclesiastical, or for three years in the case of a secular, *emphyteusis*, or when in either case he does not pay the public taxes for three years or fails to deliver to the owner the receipts for the payment of them, provided there be no agreement as to these to the contrary.⁸
 - c. When he sells his emphyteutical right to another without previously apprising the owner (§ 327, *supra*), or if he incorrectly states the price bid

¹ According to the analogy of the acquisition of servitudes by prescription and resting on Const. 12. in f. C. 7. 33, or according to the analogy of the prescription of property, see Const. 14. C. 11. 61. and Const. 8. § 1. C. 7. 39; *Unterholzner*, *Verjährungslehre*, Vol. 2, § 239, and many others are of different opinion.

² § 3. I. 3. 24. (25); Const. 1. C. 4. 66.

³ arg. fr. 11. § 1. D. 8. 6; fr. 105. D. 35. 1. See § 267, *supra*.

⁴ It is doubtful whether the *emphyteuta* may surrender the land against the owner's will. See Const. 3. C. 11. 61.

⁵ Respecting other modes of extinguishment of the relation by prescription there is doubt: *Glück*, *Comm.* Vol. 8, § 548; *Unterholzner*, *Verjährungslehre*, Vol. 2, § 241. Respecting one case see Const. 7. § 6. C. 7. 39.

⁶ But not when the *fiscus* succeeds to the *bona vacantia*.

⁷ Novel 120. c. 8.

⁸ Const. 2. C. 4. 66; Novel 7. c. 3. § 2.

for it.¹ But in all these cases the owner cannot expel the *emphyteuta* on his own authority, but must institute an action for deprivation.²

CHAPTER V.

SUPERFICIES.

SOURCES.—Dig. XLIII. 18.

LITERATURE.—*Donellus*, Comm. jur. civ. Lib. 9. c. 16–18; *Buri*, Comm. über das Lehenrecht, edit. *Runde*, Part 2. p. 570; *Dittmar*, Diss. de superficiei notione, Leipsic, 1810; *Gesterding*, vom Eigenthum, p. 444–456; *Buchholtz*, Jur. Abhandl. No. 25; *Büchel*, Civilrechtl. Erört No. 3, p. 56, *seq.*; *Niegolewsky*, de jure superficiario, Bonn, 1846; *Schmid*, Handbuch des gem. bürgerl. R. bes. Th. Vol. 2, 25–28.

I. ITS NATURE.

§ 331. *Superficies* or *superficium* by the Roman law is everything which rests on the surface of the ground, and which is so closely connected with it by art or nature as to constitute a part thereof, such as houses, trees and vines.³ According to the principles presented in § 275, *supra*, the owner of the soil, and surface by virtue of accession, is also the owner of all that which is comprehended by the above idea of superficies;⁴ but he may grant to another a right of superficies, by which the *superficiary* acquires nearly all the rights of owner of the superficies.⁵ The right of superficies may be granted in consideration of a ground-rent (*solarium*, *pensio*), though this is not as essential here as the rent is in the case of an *emphyteusis*. Such a right in superficies commonly occurs with respect to buildings on another's land, and sometimes the object of the superficies consists of only a single story of a house.⁶

II. RIGHTS AND DUTIES OF THE SUPERFICIARY.

§ 332. The rights of the superficiary are chiefly the same as those of the *emphyteuta*.⁷

1. He has the full right of use of the superficies to the extent of the grant to him.⁸

¹ Const. 3. C. 4. 66; Cap. 4. X. 3. 18.

² *Donellus*, Comm. jur. civ. Lib. 9. c. 15.

³ fr. 32. D. 23. 3; fr. 39. D. 31; fr. 2. D. 43. 18.

⁴ *Gaius*, II. 73–75; *Gaius*, Epit. II. 1. 4; fr. 3. § 7. D. 43. 17; § 29–31. I. 2. 1; fr. 2. D. 43. 18.

⁵ The prætorian edict by permitting a *utilis rei vindicatio* changed the superficiary right to a real right (§ 332, div. 5, *infra*). This is the second case in which formerly a *dominium directum* and *utile* was recognized (note 3, p. 259, *supra*).

⁶ fr. 3. § 7. D. 43. 17. Respecting the question whether this principle is applicable to forests, etc., see *Schmid*, Handb. des gem. bürgerl. R., special part, Vol. 2, p. 61, note 11.

⁷ *Buchholtz*, Jur. Abhandl. (1833), No. 25.

⁸ fr. 1. pr. D. 43. 18, according to the agreement (*ex lege locationis*).

2. His right descends to his intestate heirs.

3. He may dispose of it in any manner, either *inter vivos* or *mortis causa*.¹

4. He may mortgage² the superficies or subject it to a servitude³ for the term of his right.

5. He has an action *utilis in rem*⁴ for the enforcement of his right, and a special interdict *de superficibus*.⁵ His duties are: to bear all the burden and taxes imposed on the superficies,⁶ and to pay a ground-rent (*solarium*) if such be the agreement.⁷ No *laudemium* (fine for alienation) is payable on the alienation of the superficies, and on the redelivery of the thing the superfi-
ciary is not liable for such deterioration as it may have suffered by age or accident without his fault.

III. ACQUISITION AND ENDING OF THE SUPERFICIES.

§ 333. The right of superficies may be acquired as follows:

1. By convention. Thus when the owner of land permits another to erect a building on it, and to possess it by right of superficies, or by granting to another an existing superficies reserving rent, or alienates it reserving the ownership to the soil and surface,⁸ or when one alienates his land reserving a superficies.⁹

2. By last will (*superficies legata*); but a superficies cannot be acquired by prescription if the soil and surface cannot be similarly acquired at the same time.¹⁰

The right of superficies becomes extinct from the same causes as the *emphyteusis*, excepting that here the principles that relate to the deprivation of *emphyteusis* (§ 330, div. 8, *supra*) do not apply.¹¹

¹ fr. 10. D. 10. 2; fr. 1. § 7. D. 43. 18. The owner has no pre-emption right (*jus protimiseos*), and hence the superfi-
ciary need not inform him of the contemplated sale.

² fr. 16. § 2. D. 13. 7; fr. 9. § 1. D. 20. 1; fr. 15. D. 20. 4.

³ These rest on the prætorian law also, and are enforced by *utiles* actions: fr. 1. pr. D. 7. 4; fr. 1. §§ 6. 9. D. 43. 18; *Buchholtz*, Jur. Abhandl. p. 316.

⁴ fr. 1. §§ 3. 4. D. 43. 18; fr. 74. D. 6. 1; fr. 12. § 3. D. 6. 2.

⁵ fr. 1. pr. D. 43. 18; fr. 3. § 7. D. 43. 17. The superfi-
ciary can reacquire a pos-
session lost by him by the usual interdict *de vi* and *de precario*: fr. 1. § 5. D. 43. 16; fr. 2. D. 43. 26; *Savigny*, vom Besitz, § 47.

⁶ According to the well-known rule, he who has the use must bear the burden: *qui habet commoda, debet ferre onera*: fr. 7. § 2. D. 7. 1.

⁷ fr. 39. § 5. D. 30; fr. 15. D. 20. 4; fr. 73. § 1. fr. 74. 75. D. 6. 1.

⁸ fr. 73. § 1. fr. 74. D. 6. 1; fr. 1. § 1. D. 43. 18.

⁹ fr. 44. § 1. in fin. D. 44. 7. In this case the property of the superficies passes also to the purchaser of the land, though the alienor still retains a right to the superficies.

¹⁰ *Büchel*, Civilrechtl. Erört. No. 3, p. 68, *seq.* See fr. 26. D. 41. 3.

¹¹ In the case of non-payment of rent for two years, the rules contained in fr. 54. § 1. fr. 56. D. 19. 2. are applicable, whereby the lessor may resume possession; but these do not entitle the lessee to surrender the superficies without payment, and this is also stated by fr. 15. D. 20. 4.

CHAPTER VI.

RIGHTS OF PAWN AND HYPOTHECA.

SOURCES.—Paul, sent. rec. Lib. 2. tit. 5. 13; Dig. XX.; Cod. VIII. 14–35.

LITERATURE: ON THE ANCIENT LAW.—*Conradi*, Diss. I. II. de pacto fiduciæ, Helmstadt, 1732, 1733, and in his minor writings, edited by *Pernice*, Halle, 1823, Vol. 1, p. 177; *Thierbach*, Historia juris civ. de pignoribus, sect. 1, Leipsic, 1814; *Stass*, De contractu fiduciæ, Liege, 1824; *Minguet*, Diss. hist. jur. de pignoribus, et hypothecis apud Romanos, Ghent, 1826; *Zachariæ*, Comm. de fiducia, cap. 4, Gotha, 1830; *Hugo*, Rechtsg. p. 540, *seq.*; *Danz*, Lehrb. Vol. 1, p. 211, *seq.*; *Sintenis*, Handb., Halle, 1836; *Puchta*, Inst. Vol. 2, § 246, *seq.*; *Bachofen*, Das Röm. Pfandrecht, Vol. 1, Basel, 1847; *Keller*, Grundr. § 97; *Dernburg*, Pfandrecht, Leipsic, 1860.

ON THE MODERN LAW.—*Donellus*, Comm. Jur. civ. Lib. 9, cap. 20, and his Comment. ad Cod. Lib. 8, tit. 14–35, in his works, Vol. 9, p. 1009; *Westphal*, Erläuterung der Röm. Gesetze vom Pfandrechte, Leipzig, 3d ed. 1800; *Erzleben*, Principia de pign. et hypothecarum, Göttingen, 1779; *Gesterding*, Pfandrecht. Greifswald, 2d ed. 1831; *Glück*, Comm. Vol. 14, § 861–875, Vols. 18, 19, § 1076–1105; *Sintenis*, Handbuch des Pfandrechts, Halle, 1836; *Unterholzner*, Lehre von den Schuldverhältnissen, Vol. 2, § 767–773; *Dernburg*, das Pfandrecht, Vol. 1, Leipzig, 1860.

TITLE FIRST.

ORIGIN AND GENERAL NATURE OF RIGHTS OF PAWN AND OF HYPOTHECA.

I. NATURE AND ORIGIN.

§ 334. A right of pawn or hypotheca (*pignus, obligatio rei*) is that kind of real right¹ in another's property² which is granted to a creditor for the security of his claim, so that in case of necessity he may dispose of the thing to satisfy himself; such a right in another's thing (*jus in re aliena*) was unknown to the earliest Roman law. The object for which this at a later period was introduced was previously sought to be attained sometimes by transferring a thing to one by a fictitious action (*in jure cessio*), or by transferring it by weight and scales (*mancipatio*), on condition that after satisfaction of the transferee's claim to retransfer (*fiducia*)³ in the same manner, and sometimes the possession of a thing was given to a creditor to retain till his claim was satis-

¹ The pawn or hypothecarial right is usually a real right (see note 6, p. 266, *infra*). But only when a corporeal thing is the object of the pledge or hypotheca. On the other hand, the pawn or hypothecarial right in a pledged or hypothecated demand is more of the nature of an obligation. See § 336, div. 2, *infra*.

² There can be no true pawn or hypothecarial right in one's own property: fr. 45. pr. D. 50. 17; fr. 29. D. 13. 7; fr. 33. § 5. D. 41. 3; fr. 9. pr. D. 20. 6. See, however, note 1, p. 286, *infra*; *Jungensfeldt*, über das Pfandrecht an eigener sache. Gießen, 1827; *Sintenis*, Handb. des Pfandrechts, p. 96, *seq.*

³ *Gaius*, II. § 60; III. § 201; *Isidori*, Orig. V. 25. See also *Gaius*, IV. §§ 33. 62; *Paul*, II. 13. § 1. 6. With which there was a peculiar kind of usucaption, termed *usus receptio*: *Gaius*, II. § 60; III. § 201.

fied (*pignus* in its narrow sense, pledge).¹ The former method occurred only with such things as generally could have been transferred by weight and scales, or at least could have been transferred *in jure cessio*; hence it could not have occurred with provincial land, and for the party requiring the security it was of questionable propriety, because he was prevented from instituting an action *in rem* against the thing. The latter mode did not allow the creditor an action *in rem* when not in possession, nor did it give him the right of alienation, which he could acquire only by special authority.² But in the course of time such a collateral arrangement became unnecessary,³ and the interdicts *retinendæ* and *recuperandæ possessionis* (for the retaining and for the recovery of possession), whereby the prætorian edict protected the pawnee's possession, to some extent at least took the place of a real action. In order to retain possession of the object of the pledge by him who gave the security, it was necessary that an especial contract be made.⁴ It was an important innovation that probably according to the example of the particular law in Greece, and perhaps in other provinces, the prætorian edict in at least one case gave an action *in rem* to him to whom a thing was hypothecated, without the transfer of the possession or property (*hypotheca*).⁵ The granting of this action converted the right of the plaintiff to a *jus in re aliena* (right in another's thing); this action was soon extended to hypothecas generally, and to pledges.⁶ A similar right was afterwards recognized in incorporeal property (§ 336, *infra*), as also to new kinds of pawn-rights as they gradually arose.⁷ The *mancipatio* and *in jure cessio sub fiducia* continued somewhat⁸ in use, probably till the period when the *mancipatio* and *in jure cessio* ceased to exist. They, however, do not exist in the Justinian law.⁹

II. CONDITIONS OF A PAWN OR HYPOTHECARIAL RIGHT.

A. CLAIM.

§ 335. The pawn or hypothecarial right is in its nature a mere accessorial right; it always presumes the existence of a claim which it is designed to

¹ § 4. I. 3. 14. (3. 15); fr. 9. § 2. fr. 35. § 1. D. 13. 7. At the same time when pledges were given, and perhaps before, there were unilateral pledges taken, *pignus captum*, which had the same effect. The *pignoris capio* was at the earliest period given partly to the highest officials, to coerce disobedient persons, or against persons neglectful to the state in the fulfilment of their duty, *Puchta*, Inst. § 79, and was partly to certain favored creditors against their debtors (note 1, p. 170, *supra*).

² Gaius, II. § 64.

³ Gaius, II. § 64.

⁴ This was frequently a *precarium* (request), and sometimes it was a contract for hire. Such transactions occurred in the case of a *fiducia* (fiduciary alienee), as well as in that of the proper *pignus*: Gaius, II. § 60; fr. 6. § 4. D. 43. 26.

⁵ *Theophil.* ad § 7. I. 4. 6.

⁶ fr. 30. D. 9. 4; fr. 19. pr. D. 39. 2.

⁷ Subsequently it was still further extended. See § 356, *infra*.

⁸ See §§ 339, 342, *seq.*, *infra*.

⁹ See Const. 9. C. Th. 15. 14. of Honorius of the year 395.

secure.¹ It is immaterial whether the nature of this claim be a civil law or moral obligation, as also what may be its object, against whom it may apply, and whether the claim exists or is only in anticipation.² The efficacy of the pawn or hypothecarial right generally depends on the validity of the claim which it is to secure.³

B. THINGS CAPABLE OF BEING PLEDGED OR HYPOTHECATED.

§ 336. Everything may be the object of a pawn or hypothecarial right which gives security to the creditor and may be alienated.⁴ Subject to these conditions corporeal things of every kind as well as incorporeal things may be pledged or hypothecated. The principles affecting incorporeal things that may be pledged or hypothecated are as follows:

1. As regards servitudes the owner of the thing may give to his creditor a usufruct in it by way of pledge or hypotheca,⁵ and the usufructuary may also pledge or hypothecate his usufruct to a creditor; but in this case the creditor does not acquire the right to the usufruct itself, but only to the products of the thing, and these only so long as the pledgor or hypothecator's rights continue.⁶ Continuous prædial servitudes cannot be pledged or hypothecated without the dominant land;⁷ but a rustic servitude, not also an urban, may be given by way of pledge or hypotheca by the owner of land to his creditor on condition that if his claim be not satisfied he may sell the servitude to another neighbor.⁸

2. When a claim is hypothecated the hypothecatee is entitled in case of non-payment either to alienate the claim or to institute an action *utilis* in his own name for it. If a sum of money be the object of the claim hypothecated, then the creditor retains so much of it as is necessary to repay him; but if the object of the claim be a corporeal thing, he receives the latter in the place of a pledge (*pignoris loco*).⁹

¹ fr. 5. fr. 25. D. 20. 1; Const. 1. 2. C. 8. 33; *Thibaut*, Civ. Abhand. No. 14; *Gesterding*, Pfandrecht, §§ 3, 4. On the simple accessory nature of pawn and hypothecarial rights see *Haas*, Über die Natur der Hypotheken, Bonn, 1831.

² fr. 5. pr. § 2. D. 20. 1; fr. 9. § 1. D. 13. 7; fr. 14. § 1. D. 20. 1; Const. 2. C. 8. 31; *Buchholtz*, jur. Abh. p. 390. See § 359, *infra*, note 2.

³ fr. 2. D. 20. 3; fr. 33. D. 20. 1. See *Dernburg*, Pfandrecht, § 72.

⁴ fr. 9. § 1. D. 20. 1. See in general Dig. 20. 3; Cod. 8. 17; *Glück*, Comm. Vol. 19, § 1091.

⁵ fr. 11. § 1. fr. 15. pr. D. 20. 1.

⁶ fr. 11. § 2. fr. 15. pr. D. 20. 1; fr. 8. pr. D. 20. 6.

⁷ fr. 16. D. 8. 1; fr. 44. D. 19. 2; *Majansii*, Disp. jur. civ. Vol. 1, Disp. 4.

⁸ fr. 11. § 3. fr. 12. D. 20. 1; *Gesterding*, Pfandrecht, p. 75; fr. 12. cit. is explained differently. See *Glück*, Comm. Vol. 14, p. 24; Vol. 19, p. 207; *Elveris*, Servitutum, § 32.

⁹ fr. 18. pr. D. 13. 17; fr. 20. D. 20. 1; Const. 4. C. 8. 17; Const. 7. C. 4. 39; Const. 2. C. 4. 15; *Gesterding*, Schuldverbindlichkeit als Object des Pfandrechts, Greifswald, 1812, and Pfandrecht, p. 76; *Huschte*, de pignore nominis, Göttingen,

3. The creditor holding a pledge may repledge it, in which case the latter pledgee (*creditor creditoris*) is preferred in payment.¹

III. EXTENT OF THE RIGHT OF PAWN AND HYPOTHECA.

§ 337. The right of pawn and hypotheca is, according to its object and extent, either general (*pignus generale*) or special (*pignus speciale*).² A *pignus generale s. hypotheca omnium bonorum* (general pledge or hypothecation of all of the goods) is a pledge or hypotheca of the whole of the debtor's property. This general right of pawn and hypotheca, when no express agreement is made to the contrary, extends also to such property as the debtor may afterwards acquire, and it applies to all things whatsoever belonging to the estate pledged or hypothecated, as if they had been separately specified and specially pledged or hypothecated; hence the single things in the possession of a third party are included and may be claimed.³ It is a special pledge or hypotheca—

1. When one or more single things are pledged or hypothecated separately. Here the right of pawn or hypotheca attaches to each single thing, and it is subject thereto when it passes to any subsequent acquirer.⁴

2. When a number of things are pledged or hypothecated as a whole, as *universitas rerum*,⁵ in which is usually included the case of the pledging or hypothecating of a store of merchandise (*taberna*). As in such case the pledge or hypotheca consists of things which from their destination are subject to continual change by sale, everything that is sold out of it singly is released from the pledge or hypotheca.⁶ And, on the other hand, everything that is added afterwards to the store, whether the addition arises from production or purchase, becomes subject to the pledge or hypotheca. This last provision, however, is applicable only so long as the stock hypothecated remains in the hypothecator's hands; for as soon as it passes to his heirs, then the lien applies only to the individual contents of the stock at such time and its produce, but not to the new parts of the stock added to it by the heirs; and in case it passes to a third single successor, the lien does not apply even to the subsequent produce.⁷

1820; *Trotache*, das Verpfändungsrecht des Pfändgläubigers, Güstrow, 1834: *Buchka*, de pignore nominis, Rostock, 1843; *Dernburg*, Pfandrecht, § 60.

¹ fr. 13. § 2. D. 20. 1; Const. 1. 2. C. 8. 24.

² *Gesterding*, Pfandr. § 8–10. The opinions respecting special and general pledges and hypothecas vary considerably: *Hoffmann*, über die einzelnen sachen des Schuldners, Darmstadt, 1830; *Dernburg*, Pfandr. Vol. 1, p. 503.

³ fr. 1. pr. 15. § 1. fr. 34. § 2. D. 20. 1; fr. 4. pr. D. 20. 6; Const. 9. C. 8. 17; Const. 8. § ult. C. 5. 9.

⁴ fr. 18. § 2. D. 13. 7; Const. 12. C. 8. 28; Const. 15. C. 8. 14. But that which is added to supply the place of the things sold is not subject to the lien of the pledge or hypotheca: fr. 7. in fin. D. 20. 4; Const. 3. C. 8. 15.

⁵ *Dernburg*, Pfandr. § 59.

⁶ fr. 34. pr. D. 20. 1.

⁷ fr. 13. pr. fr. 26. § 2. fr. 29. pr. § 1. D. 20. 1; Const. 3. C. 8. 15.

3. When only a part of an entire property, whether it consist of a piece or a number, is pledged or hypothecated.¹ Sometimes, when a general pledge or hypothecation is made, a single thing belonging to the property is also pledged or hypothecated separately. In such case the creditor must first proceed against the single thing if he did not reserve the right of choice.² But, on the other hand, if several single things be specially pledged or hypothecated, and there is no agreement to the contrary, the creditor has the choice as to which of them he will first proceed against.³

TITLE SECOND.

CREATION OF PAWNS AND HYPOTHECAS.

I. BY PRIVATE VOLITION.

A. REQUISITES.

§ 338. A right of pawn or hypotheca may arise from private volition. It can be granted only by the owner of the thing to be pledged or hypothecated, or by him who in any other way⁴ has the right to dispose of it,⁵ and it may be either for his own or for another's debt.⁶ A joint owner is also permitted to hypothecate his share in the thing,⁷ and even a thing belonging to another may be pledged or hypothecated with the consent of its owner,⁸ or if he subsequently assents to it,⁹ or if he who pledges or hypothecates it does so on the condition that he will become the owner of it.¹⁰ The pledging or hypothecating of another's thing gives a *utilis* action when the pledgor subsequently becomes the owner of it.¹¹ But whether, on the other hand, it is rendered valid if the owner subsequently becomes the heir of the pawnor is controverted; the

¹ *E. g.*, Const. 1. C. 6. 43; Novel 108. c. 2.

² fr. 15. § 1. D. 20. 1; Const. 9. C. 8. 28; Const. 2. C. 8. 14; *Glück*, Comm. Vol. 18, p. 235; *Gesterding*, Pfandr. p. 345.

³ fr. 8. D. 20. 5.

⁴ Such as the claim of a creditor, the usufruct by a usufructuary. Those also are included here which allow of the Publiciana action. The creditor can enforce his right of pawn or hypotheca against the same persons against whom the pawnor can institute the Publiciana action: fr. 18. fr. 21. § 1. D. 20. 1.

⁵ fr. 3. pr. fr. 9. fr. 15. § 1. D. 20. 1; fr. 23. D. 22. 3; Const. 5. 6. C. 8. 16. See *Gesterding*, Pfandrecht, § 12.

⁶ fr. 5. § 2. D. 20. 1.

⁷ Const. un. C. 8. 21; fr. 3. § 2. D. 20. 4; fr. 7. § 4. D. 20. 6; *Westphal*, Pfandrecht, § 108.

⁸ Which also occurs tacitly when he becomes security for the pawnor: fr. 5. § 2. D. 20. 2. Or if he in bad faith is silent when his property is pledged or hypothecated: fr. 41. in fin. D. 13. 7; Const. 2. C. 8. 16.

⁹ fr. 20. pr. D. 13. 7; fr. 16. § 1. D. 20. 1.

¹⁰ fr. 16. § 7. D. 20. 1; *Dernburg*, Pfandrecht, § 28, *seq.*

¹¹ fr. 41. D. 13. 7; Const. 5. C. 8. 16. Provided that the creditor at the time of pawning or hypothecating was in good faith, otherwise he has merely a right of retention: fr. 1. pr. in fin. D. 20. 1.

affirmative opinion, however, deserves the preference.¹ Again, when in the alienation of a thing certain formalities must be observed, the same formalities must be observed in pledging or hypothecating it.²

B. MODE OF CREATION.

§ 339. A right of pawn or hypotheca may be established—

1. By convention. This is either a *contractus pignoratitius* in the case of a pawn, or a *pactum hypothecæ* in the case of an hypotheca. In the former case the delivery of the thing is requisite to the acquisition of the right; in the latter there is no delivery.³

2. By testament.⁴ In this case the right of pawn is acquired at the moment of the acquisition of the inheritance.⁵ In either case the intention of the pledgor to pledge a thing may be manifested either expressly or tacitly. Such tacit intention is presumed when the pawnor's acts admit of no other construction.⁶

C. THEIR COMMENCEMENT.⁷

§ 340. The conventional right of pawn or hypotheca generally begins at the moment of the pledging or hypothecating.⁸ The testamentary right of pawn or hypotheca always takes effect only at the moment of the acquisition of the inheritance, even though the debt may have previously existed.

D. CLAIMS FOR WHICH THEY ARE LIABLE.

§ 341. When a pledge or hypotheca is given it secures not only the principal debt, but also the interest for the delay, the costs of suit paid by the

¹ fr. 41. D. 13. 7. compare with fr. 22. D. 20. 1. See thereon, *Gesterding*, Pfandrecht, p. 110; *Glück*, Comm. Vol. 14, p. 32, *seq.* The affirmative opinion is also supported independent of fr. 22. cit. by analogy of Const. 5. C. 8. 16. and Const. 14. C. 3. 32.

² fr. 1-3. D. 27. 9; Const. 22. C. 5. 37; Const. 2. C. 5. 70; Const. 1. C. 5. 71.

³ § 7. in fin. I. 4. 6; fr. 1. pr. D. 13. 7; fr. 4. D. 20. 1; *Gesterding*, Pfandrecht, § 15-17; *Dernburg*, Pfandrecht, p. 183.

⁴ *Musset*, de jure pignoris legato, Spec. 1. 2. Heidelberg, 1810, 1811; *Dernburg*, § 34. On the history of this legacy, as also respecting fr. 12. D. 34. 1. fr. 9. D. 33. 1. fr. 26. D. 13. 7. and Const. 1. C. 6. 43, see *Dernburg*, § 33.

⁵ Many say at the moment of the testator's decease. But see *Dernburg*, p. 289. *seq.*

⁶ *Dernburg*, p. 183, *seq.*, e. g., fr. 5. § 2. D. 20. 2; Const. 2. 9. C. 8. 17. But not Const. 5. C. 4. 65. The tacit conventional right of pawn and hypotheca must not be confounded with the tacit pledge of the Romans (§ 343, *infra*).

⁷ *Hepp*, Diss. qua inquiritur ex quo tempore hypotheca bona debitoris afficiat, Lipsic, 1825; *Buchholtz*, Qui potiores sunt in pignore, Königsberg, 1829. p. 57, *seq.*

⁸ Respecting the case when the debt at this moment does not exist, see fr. 1. fr. 9. fr. 11. fr. 12. § 2. D. 20. 4; fr. 4. D. 20. 3. The opinions of writers differ on this point. Besides the works cited in note 7, *ante*, see *Glück*, Comm. Vol. 19, p. 232, *seq.* Respecting the case when the pawnor acquires the property only after the pledging or hypothecating of the thing, see fr. 1. pr. D. 20. 1; fr. 3. § 1. fr. 7. § 1. D. 20. 4; *Gesterding*, Pfandrecht, pp. 83, 248, *seq.*; *Dernburg*, § 29, *seq.*

creditor, and the expenses incurred by him on the pledge,¹ as also the interest agreed on, and the conventional penalty, but only to the extent provided for at the time of the pledging or hypothecating, but not for those provided for subsequently.² But if the pledge or hypotheca be expressly given for securing only the principal or the interest, or a part of the debt, it is liable for that only for which it was given.³

II. BY JUDICIAL ACTS.

§ 342. A right of pawn or hypotheca may also be created against the will of the owner of the thing by a judicial act, and this may be done in two different ways:

A. By a decree of the prætor giving to the creditor possession of the debtor's property as security (*missio in possessionem*) (§ 192, *supra*).⁴ The following are the cases in which such a decree is made:

1. The *missio damni infecta causa*, whose object is to secure against damage that is feared from the falling of a neighboring house.⁵

2. The *missio legatorum servandorum causa* as security for a legacy to be paid in the future.⁶

3. The *missio ventris nomine*, whereby the estate-leaver's widow, who is pregnant, is given possession of the inheritance to secure the rights of the posthumous child.⁷

4. The *missio rei servandæ causa*, for the security of creditors.⁸ The rights of pawn founded on these prætorian decrees for taking possession are termed *prætorium pignus*.⁹

B. By *pignoris capio*,¹⁰ when the prætor directs that a debtor contumacious in a suit shall be deprived of his property, partly to enforce obedience and partly as a punishment,¹¹ or when in executing judgment against him he commands that his property be seized. The latter¹² is termed *pignus in causa judicati captum*.¹³ The modern jurists term it *pignus judiciale*.

¹ fr. 8. pr. § 5. D. 13. 7; Const. 6. C. 8. 14; fr. 13. § 6. D. 20. 1; *Gesterding*, Pfandrecht, § 5; *Dernburg*, Pfandrecht, § 76.

² arg. fr. 54. pr. D. 19. 2. comp. with Const. 4. C. 4. 32; *Dernburg*, Pfandrecht, § 76.

³ fr. 11. § 3. D. 13. 7; fr. 5. 1. D. 20. 2.

⁴ fr. 26 D. 13. 7; fr. 3. § 1. D. 27. 9; *Gesterding*, Pfandr. § 22.

⁵ Dig. 39. 2. See § 518, *seq.*, *infra*.

⁶ Dig. 36. 4; Cod. 6. 54.

⁷ Dig. 37. 9.

⁸ This is more particularly treated in the doctrine of claims.

⁹ fr. 12. D. 41. 4; Cod. 8. 22.

¹⁰ But not by *adjudication*: *Dernburg*, § 21, p. 177.

¹¹ Cic. Philipp. I. c. 6. de orat. III. c. 1; Livy, III. c. 38; § 3. I. 1. 24; fr. 1. § 3. D. 25. 4; fr. 9. § ult. D. 48. 13.

¹² This was introduced by a rescript of Antoninus Pius, fr. 31. D. 42. 1.

¹³ fr. 31. 58. D. 42. 1; fr. 50. 74. § 1. D. 21. 2; fr. 10. D. 20. 4; Cod. 8. 23; 7. 53; *Küstner*, Diss. de pignore in causa judicati capto, Leipsic, 1744; *Dernburg*, Pfandrecht, § 53.

III. BY OPERATION OF LAW.

§ 343. The right of pawn and hypotheca in many cases is founded immediately on the operation of law, so that it attaches *ipso jure* to a claim as soon as the latter exists, even though it were not agreed that it should be security for the claim.¹ This right the Romans term *pignus quod tacite contrahitur*,² as also *tacita hypotheca*; ³ the modern jurists term it *pignus legale*. A right of pawn or hypotheca cannot be created by prescription.⁴

A. GENERAL LEGAL RIGHTS OF HYPOTHECA.⁵

§ 344. The rights of hypotheca established by law are either general or special. A general legal hypotheca is given—

1. To the fiscus for direct taxes from the day they become due,⁶ and also on the property of every one who contracts with it on account of any claim arising from such contract⁷ from the day of the contract, and consequently on the property of its officers and administrators from the time they enter on their offices.⁸
2. To a husband on account of the *dos* promised to him on the property of the promisor from the day of the promise.⁹
3. To a wife,¹⁰ her heirs and her father on the property of the husband for the restitution of the *dos* from the day of the promise, and also for the increase of the *dos* from the moment of its increase;¹¹ furthermore for the husband's

¹ Dig. 20. 2; Cod. 8. 15; *Gesterding*, Pfandrecht, § 19; *Dernburg*, Pfandrecht, § 35.

² This name is given to it because in all cases wherein it occurs it is regarded as tacitly agreed on by the parties: fr. 3. fr. 4. pr. fr. 7. pr. D. 20. 2; Const. 1. C. 6. 43.

³ Const. un. § 1. C. 5. 13.

⁴ The contrary is maintained by *Wankel*, Diss. de pignore usucapto, Giessen, 1786, and *E. G. Schmidt*, der Erwerb des Pfandrechts durch Verjährung, Jena, 1788. But see *Thibaut*, von der Verjährung, § 37; *Unterholzner*, Verjährungslehre. Vol. 2, §§ 247, 248; *Dernburg*, Pfandrecht, p. 178, seq.

⁵ Respecting the legal right of pawn and hypotheca, see *Meiszner*, vom stillschweigenden Pfandrecht, 2 vols. Leipzig, 1803; *Glück*, Comm. Vol. 18, 19, § 1086–1089; *Verduynen*, Diss. de hypothecis legalibus in jure Rom. Leodii, 1824; *Gesterding*, Pfandrecht, §§ 20, 21; *Dernburg*, Pfandrecht, § 36–50.

⁶ Const. 1. C. 4. 46; Const. 1. C. 8. 15; *Vangerow*, Pandektenrecht, § 375; *Dernburg*, Pfandrecht, §§ 41, 43.

⁷ fr. 47. pr. D. 49. 14; Const. 2. 3. C. 7. 73; Const. 2. C. 8. 15; *Dernburg*, Pfandrecht, §§ 41, 42.

⁸ *Dernburg*, p. 346, seq.

⁹ Const. un. § 1. C. 5. 13. See § 564, *infra*.

¹⁰ From all the legal rights of pawn and hypotheca (see § 345, div. 6, *infra*) and privileges of pawn and hypotheca (§ 350, div. 2, *infra*) which Justinian allows to the wife by Novel 109. c. 1, he excludes the heretical wives. Whether Jewesses are also excluded is greatly disputed. See *Schloß*, die Dotalprivilegien der Jüdinnen, Gieszen, 1856.

¹¹ Const. un. § 1. C. 5. 13; Const. 19. C. 5. 3; § 29. I. 4. 6. See § 571, *infra*. Respecting the date of this right of pawn and hypotheca, see *Dernburg*, p. 391.

marriage gift (*donatio propter nuptias*) on the property of her husband,¹ and on account of her paraphernalia on the property of her husband from the time when she entrusted him with the management of it.²

4. To the children of a former marriage, on the property of their step-father, for their claims, arising out of their mother's guardianship over them, from the time of her subsequent marriage.³

5. To the children, on the property of their father or mother, for their claims to those profits of marriage (*lucra nuptialia*) of the one or the other the ownership of which falls to them because the parent who acquired them marries again. This right of hypotheca vests already at the time when the parent acquired the *lucra nuptialia*, which by his or her subsequent marriage passes to the children.⁴

6. To the children, on the property of their father for the estate managed by him, so far as this has descended to them from their mother or their maternal ancestors (*bona materna et materni generis*). The children's right vests from the time that the father managed the property.⁵

7. To impubescents, minors, and insane persons, on the property of their tutors and curators for their claims arising from the tutor or curatorship from the time when it was or should have been undertaken.⁶

8. To such person as will acquire a legacy given by a testator in case a widower or widow violates the condition of not to marry again on the property of such widower or widow from the time when the condition is violated.⁷

9. To the church, on the property of its *emphyteuta*, on account of the deterioration of the emphyteutical estate,⁸ from the time that the *emphyteuta* takes possession.⁹ All these rights of hypotheca, except that of the *fiscus*, were introduced by the Christian emperors.¹⁰

¹ Novel 109. cap. 1. See § 572, *infra*. ² Const. 11. C. 5. 14. See § 573, *infra*.

³ Const. 2. C. 5. 35; Const. 6. C. 8. 15.

⁴ Const. 6. § 2. Const. 8. §§ 4. 5. C. 5. 9; Novel 22. c. 24; Novel 98. c. 1. 2. Respecting these *lucra nuptialia*, see §§ 580, 581, *infra*.

⁵ This right of pawn and hypotheca is, however, much disputed. According to the general opinion it is founded on Const. 8. § 5. C. 5. 9. and Const. 6. §§ 1. 2. 4. C. 6. 61; *Meissner*, vom stillschweigenden Pfandrecht, § 132, Leipzig, 1803; *Glück*, Vol. 19, p. 134; *Thibaut*, System, § 643.

⁶ Const. 20. C. 5. 37; Const. un. § 1. C. 5. 13; Const. 7. § 5. C. 5. 70; Novel 115. c. 5. in fin.; *Wessel*, Diss. de bonis tutorum tacita hypotheca devinctis, Utrecht, 1805. Prodigals, sick and infirm persons, as also absentees, have no legal right of hypotheca on the property of their curators, but, excepting absentees, they are privileged creditors: fr. 19-23. D. 42. 5; *Dernburg*, p. 368. A contrary opinion respecting prodigals is maintained by *Biben*, Diss. de legali pupillorum, Groningen, 1819, and *Goschen*, Grundriss, p. 169, and respecting all of them by *Glück*, Comm. Vol. 19, p. 136, *seq.*

⁷ Novel 22. c. 44. §§ 2. 8.

⁸ Novel 7. c. 3. § 2.

⁹ *Fangerow*, Pandektenrecht, § 375. It is usually said, from the moment of the deterioration.

¹⁰ These rights were extended to the property of the tutor and curator by Con-

B. SPECIAL LEGAL RIGHTS OF HYPOTHECA.

§ 345. The following persons have a special legal hypotheca :

1. The lessor of a *prædium urbanum* (uncultivated land), or of vacant land, on account of his rights arising from the contract of letting, on everything which the lessee brings on the premises for continual use from the moment of its being brought in.¹

2. The lessor of a *prædium rusticum*, on the products reaped by the lessee from the day of their perception.² Both these rights of hypotheca belong also to a sub-lessor, but this in nowise diminishes the principal lessor's right.³

3. Any one who has lent money for the restoration of an edifice, but not for the erection of a wholly new building, has a right of hypotheca on the edifice and on the ground on which it stands (*pignus insulæ*), provided that the money was lent expressly for the restoration of such building. The hypotheca is vested even if the money were not applied to that purpose. But this right is not given to one who lends money for the erection of a wholly new building, or furnishes simply building materials for or contributes labor to it.⁴

4. Pupils, on the thing which a tutor or a third party bought for himself with their money,⁵ provided such money was not given to the tutor or third party as a loan; for in that case the pupil has no right of hypotheca on the thing bought, without an agreement to that effect.⁶

5. Legatees and beneficiaries, on account of their legacies or fideicommissa, on that part of the estate burdened with the legacy or fideicommiss by the testator, which the heir received, but not on the heir's own property. If several are burdened with the legacy or fideicommiss, the right of hypotheca applies proportionately to each one's part of the estate that he received.⁷

stantine and Justinian, to the property of the stepfather by Valentinian, Theodosius and Arcadius, and because of the *lucra nuptialia* to the property of the mother by Leo and Anthemius, and to the rest by Justinian. Respecting fr. 10. D. 20. 2. see *Dernburg*, p. 187, *seq.*

¹ fr. 2-9. D. 20. 2; fr. 32. D. 20. 1; fr. 11. § 2. D. 20. 4; Const. 5. 7. C. 8. 15; *Dernburg*, Pfandrecht, § 36. Respecting Const. 5. C. 4. 65. see *Dernburg*, § 37, p. 311, *seq.*, and the writers there cited.

² fr. 7. pr. D. 20. 2; fr. 24. § 1. D. 19. 2; *Dabelow*, vom Concurse (1801), p. 191; *Dernburg*, § 37.

³ fr. 11. § 5. D. 13. 7; fr. 24. § 1. fr. 53. 19. 2. See *Glück*, Comm. Vol. 18, § 429, *seq.*

⁴ fr. 1. D. 20. 2; fr. 24. § 1. D. 42. 5; fr. 21. D. 13. 7; *Dabelow*, vom Concurse, pp. 197, 616. But for the founding of both a preference and a right of hypotheca, the actual application of the money for the rebuilding is necessary: Novel 97. c. 3. See *infra*, note 1, p. 280.

⁵ fr. 7. pr. D. 20. 4; fr. 3. pr. D. 27. 9; Const. 6. C. 7. 8; *Dernburg*, § 39. Many writers accord this right to minors, because of fr. 2. D. 26. 9. and Const. 3. C. 5. 51; *Glück*, Comm. Vol. 19, pp. 47, 288. But see *Buchholtz*, Versuche, No. 19; *Dernburg*, p. 324.

⁶ Const. 17. C. 8. 14.

⁷ Const. 1. 3. C. 6. 43; Novel 108. c. 2; *Dernburg*, § 40; *Becker*, de actione hy-

6. The wife, on account of her claim for the return of the *dos* to the dotal things.¹ The first four of these rights were introduced under the heathen emperors, the latter two by Justinian.

TITLE THIRD.

EFFECTS OF A PAWN OR HYPOTHECA.

I. IN GENERAL.

A. RIGHTS OF THE PAWNOR OR HYPOTHECATOR.

§ 346. He who has given to another a pledge of or hypotheca in a thing, whether for his own debt or for the debt of a third party, continues afterwards as before owner of the thing;² consequently—

1. He may use the thing hypothecated and reap its fruits, and in case of a pledge the pledgee must give an account of the products received by him, unless the right was given to him by special agreement to take the products instead of interest on the money lent; such an agreement is termed *antichresis*,³ or use of the pledge. If a fruit-bearing thing be delivered to a creditor as a pledge, the creditor may retain its products to the amount of the legal interest, when no interest has been agreed on.⁴

pothecaria, Greifswald, 1768, and *Glück*, Comm. Vol. 19, p. 179, *seq.*, hold that this lien being indivisible is applicable generally, and not to the share of each co-heir *pro rata*. But see, *contra*, *Dernburg*, p. 332.

¹ Const. 30. C. 5. 12.

² fr. 35. § 1. D. 13. 7; Const. 9. C. 4. 24.

³ fr. 11. § 1. D. 20. 1; fr. 33. D. 13. 7; *Hanker*, Diss. de vera indole et natura antichreseos, Giessen, 1783; *Wichelhausen*, Analecta quædam ex antichresi collecta, Göttingen, 1792; *Glück*, Comm. Vol. 14, § 870; *Gesterding*, Pfandrecht, § 30.

⁴ fr. 8. D. 20. 2. *Glück*, Comm. Vol. 14, p. 50, and *Sintenis*, Handbuch, p. 234, have a different view, because of fr. 7. D. 13. 7. Whether and in which cases the *antichretic* creditor must account for the products reaped by him, and deduct from the principal the excess over what is sufficient to pay the legal interest, is determined as follows:

1. In the case of the tacit *antichresis*, that is, when a fruit-bearing thing is pledged or hypothecated to secure a loan for which no interest was agreed to be paid, the creditor may retain the fruits to the amount of the legal interest, but must always render an account of them (fr. 8. D. 20. 2).

2. When an *antichresis* is expressly given to a creditor for a loan bearing interest, three different cases occur:

a. When the *natural* fruits of the pledged land are assigned to the creditor as compensation for the loan, he is not obliged generally to render an account (Const. 17. C. 4. 32), unless he has agreed to do so (fr. 1. § 3. D. 20. 1), or the *antichretic* agreement was made to conceal usury (Const. 26. § 1. C. 4. 32).

b. Where certain pecuniary proceeds are assigned to the creditor. In such case he must always render an account and deduct the excess from the principal, because it is the same whether the debtor pays the creditor in cash or assigns it to him.

c. When no fruits are assigned to the creditor, but only a *usus rei* (i. e., the use

2. The pawnor or hypothecator, moreover, if there be no agreement to the contrary,¹ has the right of alienating the thing pledged or hypothecated, subject to the lien of the pledgee or hypothecatee.² Still the alienation of a movable thing which has been pledged or hypothecated, without the knowledge or consent of the pawnee or hypothecatee, is regarded as a theft.³

3. If the pawnor or hypothecator at the time of pledging were not the owner of the thing, but merely a possessor by an incomplete title of prescription (*ad usucapionem*), he may continue and complete the prescription of it, while it is pledged or hypothecated.⁴

B. RIGHTS OF THE PAWNEE OR HYPOTHECATEE.

1. *In General.*⁵

§ 347. The rights of the pawnee or hypothecatee are :

1. He has a real right in the thing pledged or hypothecated, and in the case of a pledge also the possession that may be protected by interdict (*possessio ad interdicta*);⁶ but in case of a prætorian right of pawn or hypothecation he has only the detention,⁷ and in case of an hypotheca only, at least in the beginning,⁸ he has neither legal possession nor detention.

2. He may retain the thing pledged till the debt is wholly discharged;⁹ and since a pawn or hypotheca binds as a real right the thing itself pledged or hypothecated, he can enforce it against every possessor.¹⁰

3. Furthermore, he may again pledge or hypothecate the thing pledged or hypothecated to him, from which arises an after-pledge or sub-pledge.¹¹

of the debtor's house instead of interest). In such case if he uses the thing himself he is not bound to render an account, but he is obliged to do so when he lets it to another (Const. 14. C. 4. 32). See *Seuffert*, *Erört.* Part 2, No. 21; *Vangerow*, *Pand.* § 384, Rem. 2.

¹ fr. 7. § 2. D. 20. 5.

² fr. 18. § 2. D. 13. 7; Const. 12. C. 8. 28; Const. 14. C. 8. 14; Novel 112. c. 1; *Gesterding*, *Pfandrecht*, § 23.

³ fr. 19. § 6. fr. 66. pr. D. 47. 2; fr. 3. § 1. D. 47. 20.

⁴ fr. 16. D. 41. 3.

⁵ *Gesterding*, *Pfandrecht*, § 24; *Sintenis*, *Handbuch*, § 53.

⁶ fr. 16. D. 41. 3; fr. 3. § 15. D. 10. 4.

⁷ fr. 3. § 8. D. 43. 17; fr. 3. § 23. D. 41. 2.

⁸ From the moment that he obtains possession of the thing by virtue of his right he acquires the same power as a pawnee: arg. fr. 11. § 5. D. 13. 7; fr. 34. D. 39. 2; *Sintenis*, *Handbuch*, p. 230, *seq.*

⁹ The pawnee has this right of retention not only on account of the principal debt for which the thing was pledged, but also on account of the interest and the expenses incurred on it while the thing was in his possession: fr. 8. pr. § 5. D. 13. 7. The pawnee may, even for claims for which it was not pledged, retain against the pledgor and his heirs, but not against subsequent pledgees: Const. un. C. 8. 27. On this passage see *Sintenis*, *Handbuch*, p. 243, *seq.*; *Schenk*, *Vom Retentionsrechte*, p. 241, *seq.*

¹⁰ fr. 16. § 3. D. 20. 1; Const. 14. C. 8. 14. On the effect of liens on incorporeal things, see § 336, *supra*.

¹¹ See § 336, div. 3, *supra*.

4. In case the debtor does not pay at the proper time, the pawnee or hypothecatee has the right to sell the thing and reimburse himself (*jus distrahendi pignus*). This right he retains till his claim is wholly satisfied.¹ It may be restricted by agreement or testament,² but he cannot be wholly deprived of it.³ On the other hand, every agreement is void which provides that if the debtor shall fail to pay at the proper time, the thing pledged or hypothecated shall *ipso facto*, without appraisement and sale, become the property of the creditor, or that the debtor shall forfeit his right of redemption (*lex commissoria s. pactum commissorium*).⁴

2. Sale of the Pledge or Hypotheca.⁵

§ 348. With respect to the sale of the thing pledged or hypothecated, to satisfy the creditor, there is to be considered, first, the form, then the effect of it.

1. As regards the form, the creditor may sell the thing privately without judicial authority,⁶ but the sale must not be secret, and he must give the debtor previous notice of it. Moreover, he must observe the legal periods of time which the Roman law has fixed, as follows:

a. If, on granting the right of pledge or hypotheca, it was expressly agreed when the thing should be sold, the creditor is bound by such agreement.⁷

b. When naught special had been agreed on regarding the sale, *ne distrahatur pignus*, the creditor was obliged, according to the ancient law, after the day of payment had passed, to notify the debtor three times of his intention to sell before he could proceed to sell.⁸ By a later ordinance of Justinian, if the parties had not otherwise agreed, a single notice was sufficient, but the creditor could not sell till the expiration of two years thereafter.⁹

¹ Const. 6. C. 8. 28.

² fr. 4. 5. D. 13. 7.

³ Therefore the agreement not to sell the pledge is invalid: fr. 4. D. 13. 7. The creditor cannot be compelled to sell the pledge: fr. 6. pr. D. 13. 7. See § 354, *infra*.

⁴ Const. 3. C. 8. 35. Before the time of Constantine, by whom this constitution was issued, the forfeiture of the right of redemption (*pactum commissorium*) was permitted in the case of a pledge: Cicero, *ad Div.* 13. 56; fr. 81. pr. D. 18. 1; fr. 16. § 9. D. 20. 1; Paul, *sent. rec.* 2. 13; Glück, *Comm.* Vol. 14, § 869; *Gesterding*, *Pfandrecht*, § 32.

⁵ Paul, *sent. rec.* II. 5; Dig. XX. 5; Cod. VIII. 23. 28. 29. 30. 34; *Gesterding*, *Pfandrecht*, §§ 25, 28.

⁶ Const. 4. 9. C. 8. 28. Only property seized for the purpose of justice (*pignus in causa judicati captum*) must be sold by judicial authority: Cod. 8. 23.

⁷ Const. 3. § 1. C. 8. 34. The common opinion is incorrect that only *pactum ut distrahatur pignus* is to be so interpreted that the creditor may sell immediately after the failure to pay at the time of payment, and § 1. I. 2. 8, on which such opinion is based, is no authority for it.

⁸ Paul, *sent. rec.* V. 1; fr. 4. 5. D. 13. 7.

⁹ Const. 3. § 1. C. 8. 34. When it has been agreed not to sell the pledge (*ne distrahatur pignus*), such threefold notification is still requisite, and the creditor cannot sell till the expiration of two years after the last notice. See *Sentenius*, *Handbuch*, p. 510, *seq.*

c. If the thing be properly offered for sale and no acceptable purchaser be found, the creditor can apply to the regent to adjudge it to him at its value judicially ascertained; but even in this case the debtor has the right of redemption for two years thereafter.¹

2. When the thing pledged or hypothecated was properly sold by the creditor after the observance of the periods of time prescribed by law,² the following effect is produced:

a. The creditor can demand full satisfaction out of the purchase price; the surplus, if any, belongs to the debtor,³ or to the next following pledgee or hypothecatee.⁴ On the other hand, if the purchase price be not sufficient to satisfy the creditor, the debtor is bound for the deficiency.⁵

b. The property of the thing pledged or hypothecated, by its sale, passes to the purchaser by delivery, if the debtor had the property,⁶ and it vests in such purchaser discharged of all liens for pledge or hypothecation, because the sale by the creditor who was authorized to make it extinguished these liens.⁷

II. CONCURRENT LIENS OF SEVERAL PAWNEES OR HYPOTHECATEES.

A. PRIORITY.⁸

1. *General Rule.*

§ 349. When the same thing or estate is pledged or hypothecated as an entirety by the same person or persons⁹ to each of several creditors,¹⁰ the ques-

¹ Const. 3. § 2-6. C. 8. 34; fr. 15. § 3. D. 42. 1; Const. 2. C. 8. 23.

² If the creditor omits this, or if he had no right to sell, then the sale is invalid, and if it be injurious to the pawnor or hypothecator the creditor will be liable in damages to him: Cod. 8. 30.

³ fr. 8. § 5. fr. 24. § 2. fr. 35. pr. fr. 42. D. 13. 7; fr. 9. pr. D. 20. 5; Const. 3. § 4. C. 8. 34.

⁴ fr. 12. § 5. fr. 20. D. 20. 4; Const. 3. § 4. C. 8. 34.

⁵ Const. 3. § 4. C. 8. 34. See Const. 3. 9. C. 8. 28.

⁶ For the purchaser by the purchase obtains only the pawnor or hypothecator's right in the thing: arg. fr. 54. D. 50. 17.

⁷ Const. 13. C. 8. 28; Const. 1. C. 8. 20; Const. 6. 7. C. 4. 10.

⁸ Dig. 20. 4; Cod. 8. 18; Novel 97. c. 3. 4; *Gesterding*, Pfandrecht, § 33, *seq.*; *Glück*, Comm. Vol. 19, p. 228, *seq.*; *Buchholtz*, Qui potiores sint in pignorib. Regom. Bor, 1829; *Sintenis*, Handbuch, § 63, *seq.*

⁹ When a pledgee or hypothecatee again pledges or hypothecates the thing the second pledgee, etc., is preferred: fr. 13. § 2. D. 20. 1; Const. 1. C. 8. 24. See § 336, div. 3, *supra*. When the same object has been pledged or hypothecated in entirety by several persons who have no joint interest in it the creditor is preferred whose pledgor or hypothecator had the best right (*e. g.*, one was owner and the other *bonæ fidei* possessor); and if none of the pledgors, etc., had the best right (*e. g.*, all were *bonæ fidei* possessors), then the possession determines the preference: fr. 14. D. 20. 4.

¹⁰ This case must not be confounded with that when the same thing was pledged or hypothecated to several persons jointly. In this event each can claim only in proportion to his demand: fr. 16. § 8. D. 20. 1.

tion arises, Which of the creditors is preferred? The rule applied here is that the earlier pledge or hypotheca is preferred to the later.¹ This rule, however, is subject to exceptions, namely, there are rights of pawn and hypotheca to which a special preference is given by law (*privilegium, jus prelationis*), so that they are preferred to all others without respect to their age (§§ 350, 351, *infra*).

2. Privileged Hypothecas.

a. Legal.

§ 350. A right of precedence is given to some legal and to some conventional hypothecas.²

Of the legal hypothecas mentioned above (§§ 344, 345) only the following are privileged:

1. That of the fiscus for arrears of taxes.³ The lien of the fiscus on the property of all persons who contract with it, for its claims arising out of such contract, is privileged, but only in relation to such property as the party acquired after contracting with the fiscus.⁴

2. The hypotheca of the wife for the *dos*.⁵ The privilege of general hypotheca, however, is given to the wife and her heirs who are descendants only when she herself institutes her plaint for the *dos*. It cannot, like the hypotheca itself, be claimed by all the heirs, and if the *dos* were *profectitia* (derived from the father or father's father), but the marriage was dissolved by the death of the wife, in such case it cannot be claimed by the donor of the *dos*. It is much disputed whether the descendants of the wife as heirs are always entitled to this privilege or only in the few cases when they come into conflict with the second wife, who likewise demands the return of her *dos*.⁷ A betrothed woman has not this privilege if the marriage be not consummated.⁸

¹ fr. 11. pr. § 1. fr. 12. § 2. D. 20. 4; Const. 8. C. 8. 18.

² *Dabelow*, vom Concurse, cap. 8. 11; *Schweppe*, vom Concurse, §§ 70, 71; *Geslerding*, Pfandrecht, §§ 35, 36.

³ Const. 1. C. 4. 46; Const. 3. C. 7. 73. The lien of the debt of a *primipilar* (army contractor) is not privileged. See Const. 3. C. 12. 63; Cod. Theod. 7. 4; Cod. Just. 12. 38; *Glück*, Comm. Vol. 19, p. 267.

⁴ fr. 28. D. 49. 14; Const. 2. C. 7. 73; *Fragm. veteris loti de jure fisci*, § 5; *Meissner*, vom Stillschweigenden Pfandrechts, Vol. 1, § 100–104.

⁵ Const. 30. C. 5. 12; Const. 12. § 1. C. 8. 18; Novel 97. c. 2. 3; Novel 109. c. 1.

⁶ The special hypotheca for the dotal things is specially privileged: Const. 30. C. 5. 12.

⁷ See Const. un. §§ 1. 15. C. 5. 13; § 29. in fin. I. 4. 6; Const. 12. § 1. C. 8. 18; Novel 91. cap. 1; Auth. *si quid* C. 8. 18. The general opinion, which seems also to prevail in German practice, is that the *privilegium dotis* always passes to the descendants of the wife. This opinion has been adopted and defended by *Kampts* in his *Brautschatz-Privilegiums*, Berlin, 1811, as also by *Glück*, Comm. Vol. 27, p. 170, *seq.*

⁸ As there cannot be *dos* without marriage, consequently she cannot have a legal hypotheca for *dos*. fr. 17. § 1. D. 42. 5. and fr. 74. D. 23. 3. speak of the ancient

3. The pupil's hypotheca on the thing bought by his tutor or a third party for himself with the tutor's money.¹

4. The hypotheca of him who lent money for the restoration of a house (*ad restitutionem ædium*), provided that the money was actually expended for that purpose.²

b. *Conventional Privileged Hypothecas.*

§ 351. Of conventional hypothecas, all those are privileged which are founded on a credit to be used for the benefit of the thing hypothecated *versio in rem* (privilege in the thing). Whenever a privilege in the thing is created by a debt contracted on the security of an hypotheca, the hypotheca thus given has the preference, as far as the privilege in the thing (*versio in rem*) extends, over all others, legal as well as conventional, even though they should be older or public hypothecas.³ To these privileged hypothecas belong especially⁴—

1. The hypotheca given to him who for the acquisition of a thing, or for the building, preserving or repairing a house, or for fitting out a ship, or for the acquisition of an office, has given money or other things, such as building materials or labor, and who stipulated that he should have such hypotheca therefor; but this stipulation must be made at the time of the creation of the debt, and the money or other thing must be actually employed for the purpose intended.⁵

2. The hypotheca which the vendor of a thing reserves to himself at the time of the sale, till the payment of the price.⁶

c. *Priority among Privileged Hypothecas.*

§ 352. When several privileged hypothecas compete with each other for payment, the order of priority is as follows:

1. The fiscus on account of taxes has the preference over all others, not excepting those prior in date.⁷

privileged creditors against the non-hypothecarial creditor of the husband. This the bride undoubtedly has. See § 571, *infra*.

¹ fr. 3. pr. D. 27. 9; fr. 7. pr. D. 20. 4; Const. 6. C. 7. 8.

² fr. 1. D. 20. 2; fr. 24. § 1. D. 42. 5; Novel 97. c. 3. See *supra*, § 345, note 4.

³ This applies also to the legal hypothecas of this kind which have been noticed in § 350, div. 3 and 4, *supra*.

⁴ The cases following in the text are only examples.

⁵ fr. 5. 6. 21. § 1. D. 20. 4; Const. 7. C. 8. 18; Const. 17. 27. C. 8. 14; Novel 53. cap. 5; Novel 97. cap. 3. 4; *Rumpel*, Diss. de pecunia ad emendum credita privilegiata et non privilegiata, Giessen, 1772; *Pfizer*, Diss. de pignore privilegiato quod mutuando ad rem comparandam acquiritur, Stuttgart, 1792; *Schwerpe*, vom Concurse, § 70; *Zimmern*, Röm. rechtl. Abh. pp. 282, 337; *Gesterding*, Pfandrecht, p. 278.

⁶ arg. Const. 7. C. 8. 18. The vendor is to be here regarded as having lent the money for the purchase of the thing: *Glück*, Comm. Vol. 19, p. 311.

⁷ Const. 1. C. 4. 46; Const. 4. C. 8. 15; Const. 3. C. 12. 63; *Dabelow*, vom Con-

2. He who has contributed money for the purchase of an office, provided he reserved to himself the priority over all other creditors by a document attested by witnesses, otherwise the wife takes precedence of him.¹

3. The wife on account of her *dos*.² In case of competing dotal claims, those of the first wife and her children have a preference over those of the second wife.³

4. After the claims of the *fiscus* and the debtor's wife have been fully satisfied, those privileged hypothecas come next whose loans have been given and used for the benefit of the thing hypothecated.⁴ And among these he whose contribution was last given and used has the preference.⁵

5. The last place among privileged hypothecas is given to the *fiscus*, on account of its ordinary claims arising from contracts (§ 350, *supra*).

3. *Non-privileged Hypothecas.*

§ 353. Next in order to the privileged hypothecas are those which are not privileged, and without distinction whether they are legal, conventional or testamentary. The priority among them is determined by the following rules:

1. In the first place their rank is determined by their ages; so that the earlier hypotheca is preferred to the later.⁶ But the date of an hypotheca cannot generally be proved by a third person, and especially by an hypothecatee who has a competing hypotheca, by a private document, excepting when either the document was attested by three competent male subscribing witnesses (*instrumentum quasi publice confectum*), or when his opponent has no other proof of the date of his hypotheca than by a private document without such attestation.⁷

2. If the age of several hypothecas be the same, that hypothecatee is preferred who is in possession of the thing hypothecated.⁸

curse, p. 301. Concerning the opinions as to whether the wife is entitled to a preference over the *fiscus*, see *Glück*, *Comm.* Vol. 19, p. 269, *seq.* Only the wife or whoever the law authorizes to claim the return of the *dos*, to the extent of the dotal things in existence, is preferred to the *fiscus*: *Const.* 30. C. 5. 12.

¹ Novel 97. c. 4; *Glück*, Vol. 19, p. 342, notes 47, 48.

² *Puchta*, *Pand.* § 211, note f, is of a different opinion; *Vangerow*, *Pand.* § 386, *Anm.* 3, agrees with him. See note 4, *infra*.

³ *Const.* 12. § 1. C. 8. 18; Novel 91. c. 1; Novel 97. c. 3; Novel 109. c. 1; § 29. I. 4. 6.

⁴ Novel 97. c. 3. 4. According to *Puchta's* opinion, the elder hypotheca of the wife has preference over the junior hypotheca because of *versio in rem*; but otherwise when preferred hypothecas of both of these kinds compete with each other, the rules stated in the text govern.

⁵ *fr.* 5. 6. D. 20. 4.

⁶ *fr.* 11. *pr.* D. 20. 4; *Const.* 8. C. 8. 18. See *fr.* 2. *fr.* 12. §§ 2. 10. *fr.* 16. D. 20. 4. There is an exception as to prætorian hypothecas between themselves: *fr.* 12. *pr.* D. 42. 5; *Const.* 10. *pr.* C. 7. 72; *Const.* 2. C. 8. 18; *Glück*, *Comm.* Vol. 19, p. 336.

⁷ *Const.* 11. C. 8. 18; Novel 91. c. 1; *Auth.* *Si quis vult.* C. 8. 18.

⁸ *fr.* 10. D. 20. 1.

3. But if none be in possession, and their rights are equal, then each one is paid out of the thing hypothecated in proportion to the amount of his claim.¹

B. RIGHTS OF PRIOR HYPOTHECATEES.²

§ 354. An hypothecarial creditor who for any cause is preferred to another has the right to demand that his entire claim shall be fully satisfied out of the hypotheca though naught may remain for that other; and hence he may proceed to sell the hypotheca without the latter's consent.³ A posterior hypothecatee, on the contrary, is generally not permitted to sell the hypotheca without the consent of the prior one, unless the prior one's claim will be satisfied by the sale.⁴

C. RIGHTS OF POSTERIOR HYPOTHECATEES.

Jus offerendi (subrogation).

§ 355. A posterior hypothecatee, however, may avoid competition with a prior one by obtaining the latter's place. This may be done—

1. With the consent of the prior creditor, when he is paid by the posterior creditor and transfers to the latter his claim and his hypotheca.⁵

2. Or with the debtor's consent, when a posterior creditor lends him money to pay a prior creditor, which he does on condition that he be subrogated to the prior creditor's rights,⁶ or when he purchases the thing hypothecated on condition that the prior hypothecatee shall be paid with the purchase money, in which case the purchaser is tacitly subrogated to the rights of the prior creditor, though naught was expressed.⁷ In like manner as a posterior creditor may be subrogated to the rights of a prior creditor by the consent of the debtor or of such creditor, so, too, this may be done by a chirographic creditor or a third party who was not previously a creditor.⁸

3. Every posterior hypothecarial creditor only, but not a chirographic creditor or a third party,⁹ has the important right to satisfy the prior creditor

¹ fr. 16. § 8. D. 20. 1.

² That which is said here and in § 355, *infra*, respecting the relation between prior and subsequent hypothecatees relates only to the case in the text of § 349, *supra*, and not to the cases spoken of in note 9, p. 278.

³ Const. 3. C. 8. 20; fr. 12. §§ 7. 10. D. 20. 4. But he cannot be compelled to sell: fr. 6. pr. D. 13. 7.

⁴ Const. 8. C. 8. 18; fr. 15. § 5. D. 42. 1.

⁵ fr. 6. D. 18. 4; Const. 7. C. 4. 39.

⁶ fr. 3. D. 20. 3; fr. 12. §§ 8. 9. D. 20. 4; Const. 1. C. 8. 19.

⁷ fr. 3. § 1. D. 20. 5; fr. 17. D. 20. 4; Const. 3. C. 8. 19; *Gesterding*, Pfandrecht, § 40; *Glück*, Comm. Vol. 19, p. 374.

⁸ See the authorities cited in the preceding notes.

⁹ Const. 10. C. 8. 18. Any one, however, against whom an hypothecarial action has been instituted may be relieved by paying the hypothecarial debt to the plaintiff: fr. 16. § 3. D. 20. 1; fr. 12. § 1. D. 20. 6; Const. 2. C. 8. 32. And the lawful possessor who in this manner paid to relieve another, and the surety who was com-

without his or the debtor's consent, and of thereby succeeding to his rights to the extent of the sum paid or deposited in court in case the creditor refuses to accept it. This is the right of subrogation and succession (*jus offerendi et succedendi*).¹ The peculiarity of this right is that the succession to the place and right of the satisfied creditor always *ipso jure* follows without any cession being required and without distinguishing whether the prior creditor, who has been paid by a posterior creditor, is one who immediately or mediately precedes such posterior creditor.² But in the latter case he of course succeeds to the superior rights of the satisfied creditor only to the extent of the claim which he has paid to him, and the rights of the intermediate creditors are in nowise affected.³ A creditor who is still more posterior may exercise this right of subrogation to another creditor's place against a creditor who has already exercised it against a creditor prior to him.⁴ On the other hand, this right wholly ceases when the hypotheca has been regularly sold by one of the prior creditors to a third party,⁵ or when the sale has been judicially decreed, or when a commission of bankruptcy has been issued against the debtor.

III. ACTIONS ON THE RIGHTS OF PAWN AND HYPOTHECA.

A. PETITORY.⁶

§ 356. The actions arising out of the right of pawn or hypotheca are partly petitory and partly possessory. The petitory action for the enforcement of the rights of the pawnee and hypothecatee is the *hypothecaria* action.⁷

1. This action was originally given only to the lessor of a *predium rusticum* on account of the *invecta et illata* (lessee's farming effects), by agreement hypothecated to him to secure the payment of the rent, and was termed action *Serviana*. It was subsequently given by way of analogy to every pawnee and hypothecatee as a *quasi Serviana s. hypothecaria* action for the enforcement of their liens,⁸ and was extended by Justinian to the prætorian rights of pledge and hypotheca.⁹

pelled to pay for this obligation, may demand to be subrogated: fr. 19. D. 20. 4; Const. 2. 14. C. 8. 41. And if the former were not subrogated, he had the right of retention against the debtor: fr. 2. D. 20. 4.

¹ Const. 1. 5. 8. C. 8. 18; fr. 11. § 4. fr. 16. D. 20. 4; fr. 5. pr. D. 20. 5; Const. 22. C. 8. 14; Const. 4. C. 8. 19; Const. un. C. 8. 27; *Berghoff*, de successione hypothecaria, Göttingen, 1744; *Haubold*, de jure offerendi, 1793, and in his works edited by *Wenck*, Vol. 1, p. 573; *Glück*, Comm. Vol. 19, § 1097.

² See the authorities cited in the preceding note, especially fr. 16. D. 20. 4; *Gesterding*, Pfandrecht, § 39; *Glück*, Comm. Vol. 19, p. 362.

³ fr. 16. D. 20. 4.

⁴ fr. 5. § 1. D. 20. 5.

⁵ fr. 3. pr. D. 20. 5; Const. 1. C. 8. 20.

⁶ *Glück*, Comm. Vol. 18, p. 300, *seq.*; *Gesterding*, Pfandrecht, § 46-50.

⁷ § 7. I. 4. 6. It is sometimes termed *pigneratitia in rem actio*: fr. 41. D. 13. 7; tr. 3. § 3. D. 10. 4; fr. 7. § 12. D. 10. 3; fr. 11. § 10. fr. 19. D. 44. 2, and sometimes *vindicatio pignoris*: fr. 16. § 3. D. 20. 1.

⁸ § 7. I. 4. 6; Const. 1. C. 6. 43.

⁹ Const. 2. C. 8. 22.

2. This action may be instituted against every possessor of the thing pledged or hypothecated, whether it be the debtor himself or a third party;¹ and he whose right is superior or equal to the plaintiff's may generally protect himself by an *exceptio*.² When the action is instituted by the creditor against him who pledged or hypothecated the thing, or his heirs, or against a third party possessing it who derives his right from him, such creditor need only prove the debt and the pledging or hypothecation;³ but if he instituted the action against a possessor who does not derive his right from the plaintiff's pledgor or hypothecator, then he must prove that his pledgor or hypothecator was the owner of the thing at the time he burdened it or else that he had a right so to do. Where the creditor is unable or unwilling to prove more than a *bonæ fidei* possession of his pledgor he can enforce his right by the hypothecarial action only to the extent that his pledgor could enforce it by the *Publiciana* action.⁴

3. The object of the hypothecarial action⁵ is for the enforcement of the rights of pawn and hypotheca, and consequently for the surrender of the thing pledged or hypothecated to satisfy the plaintiff's claims.⁶

4. When the hypothecarial action is instituted against a third party possessing the thing he can require, according to the most modern Roman law, that the creditor shall first sue the debtor and his sureties (*beneficium excussionis personalis*),⁷ and he can also relieve himself from the action by satisfying the plaintiff's claims.⁸

5. When the thing claimed is part of an entirety which was generally pledged or hypothecated, while one or more things of this entirety were specially pledged or hypothecated in such a manner that the general pledging was only subsidiary, the defendant can require that the plaintiff shall first proceed against the special pledge (*beneficium excussionis realis*).⁹

6. The action may be instituted against the debtor or his heirs at any time within forty years, against a third party possessing the thing within forty years if the debtor be still living; but after his death the action against such third party must be within thirty or forty years, according as he takes into account the time of his possession during the debtor's life or not. When,

¹ Const. 14. 18. C. 8. 14.

² fr. 12. pr. § 7. D. 20. 4. This *exceptio* may be defeated by a *replicatio* when the plaintiff exercises the right of subrogation at the proper time: Const. 7. § 3. C. 7. 39. On the case when a subsequent creditor sues a prior one see fr. 12. pr. *supra*.

³ fr. 21. § 1. D. 20. 1; fr. 13. § 1. D. 16. 1; fr. 30. § 1. in fin. D. 44. 2; Const. 10. C. 4. 24; Const. 15. C. 8. 14; Const. 1. C. 8. 33.

⁴ fr. 23. D. 22. 3; fr. 3. pr. fr. 18. D. 20. 1; arg. fr. 9. § 4. D. 6. 2; fr. 14. D. 20. 4.

⁵ *Dernburg*, Pfandrecht, § 7.

⁶ fr. 16. §§ 3. 4; fr. 17. pr. fr. 21. § 3. D. 20. 1.

⁷ Novel 4. c. 2, which altered the former law in Const. 14. C. 4. 10. and Const. 14. 24. C. 8. 14. See Novel 112. c. 1; *Glück*, Comm. Vol. 18, p. 370, *seq.*

⁸ fr. 16. § 3. D. 20. 1; fr. 12. § 1. D. 20. 6; Const. 19. C. 4. 32.

⁹ Const. 9. C. 8. 28; Const. 2. C. 8. 14. See note 2, p. 269, *supra*.

however, a third party possesses the thing as his own property the action against him becomes extinct in thirty years, if it be not extinguished earlier in consequence of his having acquired the thing by *longi temporis* prescription.¹

B. POSSESSORY ACTIONS.

§ 357. To the possessory remedies of the pawnee or hypothecatee belong—

1. The ordinary interdicts *retinendæ et recuperandæ possessionis* for the protection of his possession of the thing pledged or hypothecated.²

2. The interdict *Salvianum*; this is an interdict for the recovery of the possession (*adipiscendæ possessionis*), which originally, like the action *Serviana*, belonged only to the lessor of a *predium rusticum*, in order, when the rent was not paid at the proper time, to remove the obstructions which prevented the taking of possession of the things conventionally pledged or hypothecated to him by the tenant.³ It was subsequently given by analogy to all hypothecarial creditors, interdict *quasi Salvianum*.⁴ According to the ancient law it was applied against every possessor of the thing pledged or hypothecated, but by the later law it can only be employed against the pledgor or hypothecator.⁵

3. The interdict *ne vis fiat ei, qui in possessionem missus est* (that no wrong be done to him who is authorized to take possession), which belonged to him whom the prætor authorized to take possession and was unjustly prevented from doing so. Its aim was to obtain full compensation for the damage sustained.⁶

TITLE FOURTH.

EXTINCTION OF THE RIGHTS OF PLEDGE AND HYPOTHECA.⁷

I. FROM GENERAL CAUSES.

§ 358. The rights of pledge and hypotheca are extinguished by general causes—

1. When the thing pledged or hypothecated perishes,⁸ or when it becomes so changed that it is no longer the same thing nor can become so again.⁹

¹ Const. 7. pr. §§ 1. 2; Const. 8. pr. C. 7. 39, taken in connection with Const. 1. 2. C. 7. 36; *Unterholzner*, Verjährungslehre, Vol. 2, § 249.

² fr. 1. § 9. D. 43. 16; fr. 16. D. 41. 3; fr. 3. § 15. D. 10. 4. See § 347, *supra*.

³ Gaius, IV. § 147; § 3. I. 4. 15, and Theophilus on the same: fr. 1. pr. § 1. D. 43. 33; *Gesterding*, Pfandrecht, § 51; *Huschke*, Studien des Röm. Rechts, Breslau, 1830, No. 4.

⁴ Const. 1. C. 8. 9. comp. with § 7. I. 4. 6.

⁵ fr. 1. pr. § 1. D. 43. 33; Const. 1. C. 8. 9. This point, however, is much disputed.

⁶ Dig. 43. 4. Compare § 192. *supra*, div. 5, and § 342.

⁷ Dig. 20. 6; Cod. 8. 26. and 31; *Gesterding*, Pfandrecht, § 41–45.

⁸ fr. 8. pr. D. 20. 6; Const. 25. C. 8. 14. If the thing be afterwards restored the right of pawn or hypotheca is revived: fr. 29. § 2. fr. 35. D. 20. 1.

⁹ fr. 18. § 3. D. 13. 7. Undertaking a change in the thing does not extinguish the right of hypotheca or pledge: fr. 16. § 2. D. 20. 1.

2. When a confusion in the ownership occurs, as when the pledge or hypotheca and the right of pledge unite in the same person.¹

3. When it was given only for a certain period and this period has expired.²

4. When this right was given by one who had only a revocable property in the thing, and such right was revoked.³

5. When the creditor renounces the pledge or hypotheca,⁴ and also when he causes surety or other security to be given him instead of the pledge or hypotheca,⁵ or when he tenders to the debtor an oath that the thing is not pledged or hypothecated and the debtor takes such oath.⁶ The creditor tacitly renounces when, before payment of the debt, he returns the pledge or obligation of the indebtedness,⁷ when he grants express permission to sell the pledge or hypotheca to another,⁸ and when he has been summoned under a penalty of loss to enforce his right and does not enforce it within the time appointed by law.⁹

¹ fr. 29. D. 13. 7; fr. 9. pr. D. 20. 6; fr. 30. § 1. in fin. D. 44. 2. When one buys a thing pledged or hypothecated to several creditors and with the purchase-money satisfies a prior creditor he can exercise all the rights against the posterior creditors which belonged to the prior creditor whom he succeeds; but, on the other hand, he must permit the posterior creditors to exercise the right of subrogation against himself: Const. 3. C. 8. 19; fr. 17. D. 20. 4. And when the owner of a pledge gives it to a prior creditor in payment or sells it to him in satisfaction, such action does not prejudice the rights of posterior creditors: Const. 1. C. 8. 20. Which is also the case when he who, having a right of pledge or hypotheca of which he was ignorant, acquires the thing itself pledged or hypothecated: fr. 30. § 1. D. 44. 2.

² fr. 6. pr. D. 20. 6.

³ fr. 3. D. 20. 6; fr. 31. D. 20. 1; fr. 4. § 3. D. 18. 2. Hence the sub-pledge becomes extinguished with the cessation of the right of the first pledgee: fr. 40. § 2. D. 13. 7; Const. 1. C. 8. 24.

⁴ fr. 8. § 1. D. 20. 6; Cod. 8. 26. However, a unilateral unaccepted renunciation, except in the case of a legacy or devise, is not binding. See § 193, note 3, *supra* (comp. § 323, *infra*, note 3).

⁵ fr. 6. § 2. fr. 6. § 2. fr. 14. D. 20. 6; fr. 9. § 3. C. 13. 7; arg. Const. 8. C. 8. 42.

⁶ fr. 5. § 3. D. 20. 6. See § 475, *infra*.

⁷ Const. 7. C. 8. 26; fr. 1. § 1. D. 34. 3; fr. 3. D. 2. 14; *Westphal's*, Pfandrecht, § 237.

⁸ fr. 4. § 1. fr. 7. pr. fr. 12. pr. D. 20. 6; fr. 158. D. 50. 17; Const. 2. 11. C. 8. 26. See fr. 4. § 2. fr. 8. § 15. D. 20. 6. If the sale be not made or is revoked the right of pledge or hypotheca continues: fr. 8. § 6. fr. 10. pr. D. 20. 6. And when the debtor reacquires the thing alienated, the pledge or hypotheca is not revived when the lien of the pledge or hypotheca covers all the debtor's present or future property: Const. 11. C. 8. 26; *Glück*, Comm. Vol. 19, p. 431. When a pledgee merely consents to a further pledging of the thing he does not thereby lose his right of pledge, but only his right of priority, but in doubtful cases he loses his right of pledge: fr. 9. § 1. fr. 12. pr. D. 20. 6. fr. 12. § 4. D. 20. 4.

⁹ Const. 6. C. 8. 26.

6. The pledge or hypotheca is extinguished by the *longi temporis* prescription, which can only occur when the possession has been transferred to a third person who is not the universal successor of the pledgor or hypothecator and knows naught of the lien of the pledge or hypotheca.¹

II. FROM THE PECULIAR NATURE OF THE RIGHTS OF PLEDGE AND HYPOTHECA.

§ 359. The lien of a pledge or hypotheca is extinguished—

1. When the debt for which the lien was created is wholly discharged,² or by a merger of the claim and debt in the same person.³

2. When the pledge or hypotheca is regularly sold by the creditor,⁴ which extinguishment is not only for the benefit of the alienor, but for all of the other pledgees or hypothecatees.⁵

¹ fr. 12. D. 44. 3; Const. 1. 2. C. 7. 36; Const. 19. C. 8. 45; Const. 7. C. 4. 10; Const. 8. pr. C. 7. 39. Neither the debtor nor his heirs can end the right of pledge or hypotheca by acquisitive prescription: fr. 1. § 2. D. 20. 1. fr. 44. § 5. D. 41. 3; Const. 7. C. 8. 14.¹ On the contrary, the hypothecarial action against them endures for forty years: Const. 7. § 1. C. 7. 39; *Donellus*, Comm. Jur. civ. Lib. 5. c. 29; *Unterholzner*, Verjährung durch fortges. Besitz, pp. 75, 293, 313, 418, and in his Verjährungslehre, Vol. 2, § 249.

² fr. 9. § 3-5. fr. 13. pr. D. 13. 7; fr. 6. pr. D. 20. 6; fr. 18. D. 46. 2; Const. 3. C. 8. 31. When the debt has been extinguished in part the lien of the pledge or of the hypotheca because of its indivisibility continues for the remainder: fr. 9. § 3. D. 13. 7; Const. 2. C. 8. 29. Hence also in the case when one of several co-heirs has paid only his share of the debt of the estate: Const. 1. C. 8. 31; Const. 2. C. 8. 32; Const. 16. C. 8. 28. In like manner the pledge or hypotheca continues when the action for the debt is repelled by such an exception as does not destroy the debt, but only bars the action, and therefore the debt remains effective as a *naturalis obligatio*: Const. 2. C. 8. 31.

³ fr. 75. fr. 95. § 2. fr. 107. D. 46. 3. comp. with fr. 43. D. 46. 3.

⁴ Cod. 8. 30.

⁵ Const. 1. C. 8. 20. On the case when not the pledgee or hypothecatee, but an heir who has the *beneficium inventarii*, sells the inheritance property to pay inheritance debts or legacies, see Const. 22. § 8. (comp. with §§ 5. 6.) C. 6. 30.

SECOND BOOK.

OBLIGATIONS.

On the Roman law of obligations generally: *Donellus*, comm. jur. civ. Lib. XII.—XVI.; *Bucher*, das Recht der Forderungen nach dem neuesten Röm. Rechte, Leipzig, 1830; *Koch*, das Recht der Forderungen, 3 vols., Breslau, 1836–1843; *Unterholzner*, Lehre des Römischen Rechts von den Schuldverhältnissen, edited by *Huschke*, 2 vols., Leipzig, 1840; *Vangerow*, Lehrbuch der Pandekten, Vol. 3; *Savigny*, das Obligationenrecht, 2 vols., Berlin, 1851, 1853; *Molitor*, les obligations en droit romain, 3 vols., Ghent, 1851–1853.

SECTION FIRST.

PRELIMINARY PRINCIPLES—NOTION AND DIFFERENCE OF OBLIGATIONS IN GENERAL.

CHAPTER I.

I. NATURE OF OBLIGATIONS.

§ 360. Obligation is the legal relation existing between two certain persons, whereby one (the creditor) is authorized to demand of the other (the debtor) a certain performance which has a money value. In this sense obligation¹ signifies not only the duty of the debtor, but also the right of the creditor.² The fact establishing such claim and debt, as also the instrument evidencing it, is termed obligation.³

II. OF THE DIFFERENT KINDS OF OBLIGATIONS.

A. ACCORDING TO THEIR SUBJECTS.

§ 361. As respects the subjects of obligations there may be—

1. A single creditor and a single debtor.
2. Or there may be several creditors and several debtors, which include—

¹ Pr. Inst. 3. 13. (14). "An obligation is the bond of the law whereby one is put under the necessity to perform a certain matter in accordance with the law of our state:" fr. 3. pr. D. 44. 7. *Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum.* See fr. 9. § 2. D. 40. 7; *Du Roi*, spec. observat. de jure in re (Heidelberg, 1812), obs. 1, § 2; *Savigny*, Obl. R. §§ 2, 3, 28; *Ibid.*, System, Vol. 5, pp. 589, 596, seq.; *Bucher*, Das Recht der Forderungen, *supra*, §§ 1, 2; *Unterholzner*, Schuldverhältnisse, Vol. 1, p. 200, seq.

² fr. 9. D. 50. 16.

³ Const. 7. C. 4. 30. In relation to things, *obligatio* sometimes signifies the right of pawn: Const. un. C. 8. 21; fr. 11. § 6. D. 13. 7; Const. 4. C. 8. 17; Const. 6. C. 8. 26; sometimes the pledge of a thing: fr. 4. D. 20. 3; and sometimes the writing evidencing the pledge: fr. 28. D. 48. 10.

a. The obligation pro rata or in part, when each of a number of creditors can only demand a part of the object, or each of a number of debtors is obliged to pay only a part.¹

b. The obligation *in solidum*,² when of the several creditors each is entitled to demand the whole (obligation correal active), or of the several debtors each is obliged to perform the whole (obligation correal passive). In the case of a penalty the whole may be performed several times.³ In the first place, when one of the creditors has received the whole the others cannot demand anything more. In the second place, when one debtor has performed the whole the others are discharged.⁴ The obligation *in solidum* arises from stipulations (§ 449, *infra*),⁵ and also from obligatorial agreements that several creditors shall be correal creditors (obligations correal active), or that several debtors shall be correal debtors (obligations correal passive),⁶ and also from testaments,⁷ or from the indivisibility of the object of the contract;⁸ also from certain quasi-contracts, by which several persons are bound to do a thing.⁹ There is also an important case of passive correalty when several persons are bound to compensate the damages in consequence of a common wrong¹⁰ or quasi-delict.¹¹ The correal debtors have in some cases, but not always, the

¹ fr. 11. §§ 1. 2. D. 45. 2; fr. 10. § 3. D. 49. 1; Const. 6. C. 3. 36. There is not here simply one obligation, but as many several obligations as there are creditors or debtors: Const. 6. C. 3. 36.

² *Solidum* here means, as it does in other connections, an *whole*.

³ As when several commit in common a wrong, for which an entire private penalty must be paid by each: fr. 11. § 2. D. 9. 2; fr. 55. § 1. D. 26. 7; Const. 1. C. 4. 8. An apposite example of several being solidarily entitled is contained in § 2. I. 4. 4. It is undoubted that in such cases there are as many several existing obligations as there are creditors or debtors.

⁴ *Donellus*, Tract. de duob. reis, in his works, Vol. 9; *Ronchegalli*, Tr. de duob. reis, Leyden, 1559, Marp. 1612; *Dresky*, Diss. de correali obl., Göttingen, 1777; *Ribbentrop*, zur Lehre von den Correalobligationen, Göttingen, 1831; *Unterholzner*, Schuldverh. Vol. 1, pp. 173, *seq.*, 634, *seq.*; *Savigny*, Oblig. Recht, § 15-27; *Helmolt*, die Correaloblig. Gieszen, 1857; *Demangeat*, des obligations solidaire, Paris, 1858; *Samhaber*, zur Lehre von der Correaloblig. Erlangen, 1861.

⁵ There are several titles thereon in the Institutes, Pandects and in the Code: Inst. 3. 16. (3. 17); Dig. 45. 2; Cod. 8. 40.

⁶ fr. 9. pr. D. 45. 2; fr. 47. D. 19. 2. Correal, derived from *correus*, co-debtor, signifies the connection of several debtors or several creditors in a transaction which is an entirety (*in solidum*). Each of the several creditors is or all are entitled to sue for the whole against each or all of the debtors: *Savigny*, Obl. R. § 16.

⁷ fr. 9. pr. D. 45. 2; fr. 8. § 1. D. 30.

⁸ fr. 5. § 15. D. 13. 6; fr. 1. § 43. D. 16. 3; fr. 59. § 3. fr. 60. § 2. D. 17. 1; fr. 52. § 3. D. 46. 1; Const. 28. C. 8. 41.

⁹ When several administer a pupil's undivided estate: fr. 1. § 43. D. 16. 3; fr. 18. § 1. fr. 42. D. 26. 7; fr. 1. §§ 13. 17. fr. 15. 21. D. 27. 3; Const. 2. C. 5. 68.

¹⁰ fr. 14. § 15. fr. 15. D. 4. 2; fr. 5. pr. D. 9. 4; fr. 3. pr. D. 11. 6; fr. 8. D. 27. 6; fr. 1. § 15. D. 43. 16; Const. 1. C. 4. 8.

¹¹ fr. 2. § 4. D. 9. 3.

benefit of division (*beneficium divisionis*),¹ by virtue of which, when a correal debtor has been sued, he can demand that if the remaining debtors are solvent he shall be adjudged to pay only a part.

B. ACCORDING TO THEIR OBJECTS.

§ 362. With respect to its object, an obligation is to give, do, permit or forbear.² It may be single or compound, according as it embraces one or several objects. The latter is either copulative, when the several objects must be performed together in order to release the debtor, or alternative, when only one or the other need be performed; in the latter case the debtor generally has the choice which he will perform.³ To this rule there is an exception,⁴ when at the formation of the obligation the creditor expressly reserved the right of choice. If he has chosen and instituted his action for the object chosen, his claim for the other object is thereby extinguished, notwithstanding that he may fail in his action.⁵

C. ACCORDING TO ITS EFFECT.

§ 363. Only that claim is perfectly effectual which creates a personal action that cannot be barred by a preemptory exception.⁶ Such claim may rest on the civil law (*obligatio civilis*) or on the *jus honorarium* (*obligatio honoraria*, chiefly *prætoria*);⁷ it may appear as a characteristic of the Roman law or belong to the *jus gentium* (*obligatio naturalis* in its wide sense).⁸ If there

¹ This legal benefit was introduced by Hadrian, not for the proper correal debtors, but for co-sureties (*confidejussores*) (§ 453, div. 3, *infra*) of the same principal debtor, and to the cases of mandates (§ 425, *infra*). This benefit was extended by Justinian to the security for another's debt, termed *constitutum* (§ 472, *infra*): fr. 7. D. 27. 7; Const. ult. c. 4. 18. It was at an early period extended to two kinds of correal debtors, namely, to the several cases where there were guardians and to officials: fr. 1. § 11-13. D. 27. 3; fr. 7. D. 27. 8. It is claimed that Novel 99. has extended this benefit to every or nearly every case in which several debtors by virtue of an agreement are solidarily bound; but on this there is some conflict of opinion. See *Glück*, Comm. Vol. 4, § 339.

² Obligations arising from forbearance are rare. Of several of them it may be said that they proceed on a permission. Examples: fr. 2. § 5. fr. 4. pr. § 1. fr. 50. pr. fr. 75. § 5. fr. 83. pr. fr. 85. § 3. D. 45. 1; fr. 13. pr. D. 8. 4; *Savigny*, Obl. Recht. § 28, p. 296.

³ fr. 10. § 6. in fin. D. 23. 3. See fr. 138. § 1. D. 45. 1; fr. 34. § 6. D. 18. 1; fr. 75. § 3. D. 30; *Mühlenbruch*, Von der cession der Forderungsrechte, 3d ed. p. 263; *Savigny*, Obl. Recht. § 38, p. 389, *seq.*

⁴ Another rare exception, which frequently is extended too far, is contained in fr. 2. § 3. D. 13. 4. A further exception in alternative legacies is mentioned by *Savigny*, Obl. Recht. p. 392, *seq.*

⁵ fr. 19. D. 31; fr. 112. pr. 45. 1; fr. 9. § 1. D. 14. 4; fr. 4. § 3. D. 9. 4; fr. 5. pr. D. 30. See also note 3, p. 178, *supra*.

⁶ fr. 10. D. 50. 16; fr. 42. § 1. D. 44. 7.

⁷ § 1. I. 3. 13. (14); §§ 3. 8-11. I. 4. 6; fr. 1. § 8. D. 13. 5.

⁸ fr. 84. § 1. D. 50. 17. See also § 1. I. 3. 13. (14); fr. 5. D. 1. 1; fr. 10. D. 44. 7;

be not *ipso jure* an actionable obligation (*obligatio* in its narrow sense),¹ or if a peremptory exception can be effectually pleaded to the action arising from such obligation,² yet sometimes, because of natural equity, it is not wholly ineffectual. In such cases there exists a *naturalis obligatio* in its narrow sense.³ Its efficacy consists in this, that when it is executed it remains unchanged, so whatever has been done cannot be redemanded,⁴ to which in most cases is superadded that the unsatisfied claim may be as effectually enforced in a manner other than by suit,⁵ and that the legal transaction, which for its validity requires preliminarily a demand, may be concluded with equal efficacy as if it were a perfectly actionable obligation.⁶

CHAPTER II.

OF THE CESSION OF CLAIMS.⁷

I. NOTION OF CESSION.

§ 364. Claims as legal relations between determinate persons (§ 360, *supra*) cannot according to their nature be transferred from the creditor to another, so as to take the creditor's place, without the assent of the debtor. Hence it was a principle of the Roman law that obligations could only pass to another by universal succession and not by several succession, and therefore could not be ceded to another.⁸ If one desired to give to another the benefit of a claim, it could only have been done originally by authorizing him to sue for it, so that whatever he might recover by the suit should be for himself. This is termed *præstare s. mandare* action, and he who was thus authorized was termed agent in his own matter (*procurator in rem suam*).⁹ Originally he could only sue in the name of the proper creditor, but subsequently he was

fr. 16. § 4. D. 46. 1. There is a contention as to the interpretation of the last two passages in this respect. See *Vangerow*, Pand. § 566.

¹ pr. § 1. I. 3. 13. (3. 14); fr. 7. § 4. D. 2. 14.

² See, e. g., fr. 9. §§ 4. 5. fr. 10. D. 14. 6.

³ *A. D. Weber*, Von der natürlichen Verbindlichkeit und deren gerichtlichen Wirkung, 5th ed., Schwerin and Wismar, 1811; *Koch*, Recht der Forderung, Vol. 1, p. 16, *seq.*; *Unterholzner*, Schuldverhältnissen, Vol. 1, p. 11, *seq.*; *Savigny*, Obl. R. § 5-11; *Schwanert*, Naturalobligation des Röm. Rechtes, Rostock, 1861.

⁴ fr. 10. D. 14. 6; fr. 16. § 4. D. 46. 1.

⁵ See, e. g., fr. 6. D. 16. 2.

⁶ Namely, suretyship, pawn, novation and *constitutum*: § 1. I. 3. 20. (3. 21.) fr. 5. pr. fr. 14. § 1. D. 20. 1; fr. 1. § 1. D. 46. 2; fr. 1. § 7. D. 13. 5.

⁷ *Donellus*, Comm. jur. civ. Lib. 15, cap. 43; *Glück*, Comm. Part 16, § 1017-1025; *Bucher*, Recht der Forderungen, § 23-31; especially, *C. F. Mühlenthal*, Von der cession der Forderungsrechte, Greifswald, 2d ed. 1826; *Koch*, die Lehre von dem Uebergang der Forderungsrechte, Breslau, 1837; *Unterholzner*, Schuldverh. Vol. 1, p. 601, *seq.*

⁸ *Mühlenthal*, § 1-4.

⁹ fr. 3. § 5. D. 15. 3; fr. 8. § 5. D. 17. 1; fr. 76. D. 46. 3; fr. 2. D. 16. 3; fr. 31. D. 19. 1; fr. 7. D. 44. 7; Const. 6. C. 4. 10.

permitted to sue in his own name, by an *utiles* action,¹ which was just as efficacious as the *directa* action.² But afterwards by another legal transaction, in which one permitted a second party to exercise his right to claim, the same *utiles* actions were produced as the *mandatum ad agendum*. In the modern law the general term is now *cedere actionem s. rem s. session of an action or claim*.³ *Cessio actionis s. nominis* or cession of a claim is therefore really naught more than the declaration and authority that another shall be authorized to sue for our claim as his own and for his benefit and generally to use it.⁴ Such a cession may be based on purchase, exchange, gift and other titles.

II. SUBJECTS OF CESSION.

§ 365. He who cedes to another a claim is termed at the present day *cedens*; he to whom it is ceded *cessionarius* or *procurator in rem suam* (agent in his own matter); and he against whom the claim is, *debitor cessus*. Generally a claim may be ceded to any one; yet there are the following exceptions:

1. The cession, subject to the penalty of the loss of the claim, cannot be made with a crafty intention, i. e., to a person who is so far superior to the debtor in power and esteem that he can readily oppress him.⁵

2. He who as tutor or curator manages the property of another cannot have a claim ceded to him against the latter during the existence of the tutor or curatorship nor after its determination: the penalty for which is the loss of the claim.⁶

III. OBJECTS OF CESSION.

§ 366. In general all claims and complaints which constitute a part of the cedor's estate may be ceded, whether the latter be actions *in rem* or *in personam*.⁷ All actions which are vindictive (*quæ satisfactionis spiritus*),⁸ the criminal plaints so far as they proceed for the public punishment of the crime,⁹

¹ fr. 16, pr. D. 2, 14; fr. 76, D. 46, 3; Const. 7, 8, C. 4, 3; Const. 1, 2, C. 4, 10; Const. 5, C. 4, 15; Const. 16, C. 6, 37; Mühlentrich, § 16.

² fr. 47, § 1, D. 3, 5; Mühlentrich, §§ 16, 17, especially p. 181, *seq.*

³ Respecting the difference between the cession and delegation of a claim, see *infra*, §§ 541, 542.

⁴ Const. 2, C. 2, 14. The cession is valid if not fraudulent: fr. 6, D. 43, 14. Mühlentrich, § 30, is against the adoption of a general prohibition of the crafty *cessio in potentiorum*. But see Vangerow, Pand. § 574, p. 111, *seq.*

⁵ Novel 72, cap. 5; Mühlentrich, §§ 32, 34.

⁶ Mühlentrich, § 22-25.

⁷ See *supra*, § 212; fr. 29, D. 47, 10; fr. 7, § 1, fr. 13, pr. D. *ibid.*; fr. 6, in fin. D. 47, 12. Hence the following cannot be ceded: the *querela inofficij testamenti* and *inofficij donationis*, the action *repetitio donatio propter ingratitudinem*. Cf. *contra* are Böhm, Electa jur. civ. Part I, cap. 2, § 29; Guterberg, Nachforsch. Vol. I, p. 306.

⁸ fr. 13, § 1, D. 43, 1. The demand for damages and private punishment for injury can be ceded: fr. 14, pr. D. 47, 2; fr. 31, pr. D. 19, 1; fr. 38, § 1, D. 46, 3; fr. 12, D. 50, 16.

and all popular actions cannot be ceded.¹ A plaint capable of being ceded ceases to be such as soon as a legal action has been commenced for it.²

IV. REQUISITES FOR CESSION.

§ 367. The cession of a claim or a plaint is an alienation.³ Hence only they can cede who have the free disposition of their property. In general every cession requires the consent of the cedor. When one transfers a right to another, or has acquired a right for him, he must also cede the accruing plaint.⁴ The consent of the debtor is not required to the cession.⁵

V. EFFECT OF THE CESSION.⁶

§ 368. By the cession of a claim the relations of the cedor with the debtor are not substantially altered; the cedor does not thereby lose his claim; but so long as the cedeo does not sue, and the debtor is not notified of the cession, the cedor can institute an action against the debtor,⁷ and whatever he recovers must be given to the cedeo.⁸ But should he sue after the cedeo had commenced his action, or after the debtor has been notified of the cession, then the latter can set up the exception *doli* to the action.⁹

The relations between the cedor and cedeo consist in the effect of the cession in—

1. That by the cession the entire right of the cedor is transferred to the cedeo, including all accessorial rights.¹⁰

2. In general the cedeo is subject to all defences which could be urged against the cedor.¹¹

3. The cedor guarantees to the cedeo the actual existence of the ceded claim (except he give it to him). In general he guarantees its goodness, i. e., the solvency of the debtor, only when he has so agreed or when he has been guilty of fraud.¹²

¹ fr. 5. D. 47. 23.

² Const. 2. 3. 4. C. 8. 37; *Mühlenbruch*, § 31.

³ See § 368, *infra*.

⁴ fr. 31. pr. D. 19. 1; fr. 14. pr. fr. 80. pr. D. 47. 2; Const. 4. C. 4. 39; fr. 49. § 2. D. 41. 2; fr. 2. § 5. D. 10. 2; fr. 41. § 1. D. 46. 1; fr. 76. D. 46. 3; Const. 2. 11. 14. C. 8. 41; *Mühlenbruch*, § 36, *seq.*

⁵ Const. 3. C. 4. 39. Yet he need not permit a disadvantageous severance of the ceded claim: arg. fr. 27. § 8. D. 15. 1.

⁶ *Mühlenbruch*, § 46–64.

⁷ Const. 3. C. 4. 35; Const. 3. C. 8. 42; Const. 4. C. 8. 17.

⁸ fr. 23. § 1. D. 18. 4.

⁹ fr. 16. pr. D. 2. 14; fr. 17. D. 2. 15; Const. 3. C. 8. 42.

¹⁰ fr. 6. 23. D. 18. 4; Const. 7. C. 4. 39.

¹¹ fr. 4. § 27–31. D. 44. 4; Const. 5. C. 4. 39; *Weber*, Von der nat. Verb. § 117, note 9.

¹² fr. 4. 5. D. 18. 4; fr. 74. § 3. D. 21. 2; *Schliemann*, über die Haftung des Cedenten, 2d ed., Rostock u. Schwerin, 1850.

VI. LEX ANASTASIANA.

§ 369. To prevent the purchasing of claims from avarice or to injure the debtor, Anastasius ordained that whoever purchased a claim for a less price than its true value shall not sue the debtor for more than he paid for it in addition to the lawful interest. This ordinance was afterwards renewed by Justinian, and in several points more precisely determined and elucidated.¹ From the combination of these two ordinances arise the following principles:

1. The *Lex Anastasiana* now only refers to purchased and not to donated claims; it is applied without qualification when the claim was partly a purchase and partly a gift, because otherwise the law might be easily avoided.

2. It is only applicable to such claims as call for money.²

3. Subject to both these conditions it exceptionally is not applied—

a. To a cession in payment, provided that no evasion of the law is intended.³

b. When co-heirs and legatees, for the purpose of division of the estate, cede to themselves claims on the inheritance.

c. When the cession is made for the protection or preservation of the possession of a thing which serves for the security of a claim; e. g., when a posterior pawn creditor pays a preceding one to succeed to his place and rights (§ 355, *supra*).⁴

d. When the ceded claim at the time of the cession was insecure or uncertain.⁵

e. When a totality of claims (*universitas nominum*) is ceded.⁶

4. In the cases where the debtor can invoke the *Lex Anastasiana* against the cede, the effect is that where the claim amounts to more than the price

¹ Const. 22. 23. C. 4. 35; *Bach*, Exercit. jur. civ. de lege Anastasiana, in his works ed. *Klotz*, Halle, 1767, No. 9; *Reinhold*, Diss. ad legem Anastasianam, in his works ed. *Jugler*, p. 279; *Schele*, Spec. de justis limitibus lege Anastasiana nominis cessionis positus, Helmstadt, 1794; *Anckelman*, Diss. de cessione nominis, Göttingen, 1791, § 7-13; *Glück*, Comm. Vol. 16, §§ 1024, 1025; *Mühlenbruch*, § 30-53.

² To the contrary are now the most writers, together with *Mühlenbruch*, p. 543, who also refers the ordinance to claims which have for their object other fungible things.

³ E. g., one borrows first a small sum and thereupon cedes a greater demand to his creditor in payment: arg. Const. 23. C. 4. 35.

⁴ By a later ordinance of Justinian, Const. 24. C. 4. 35, all these exceptions are again abolished; but this constitution is a non-glossed *lex restituta* (§ 79, *supra*).

⁵ This exception is not found in the law; but an insecure or uncertain claim is not worth as much as its nominal value indicates, and who therefore pays less for it buys it not under value.

⁶ *Mühlenbruch*, p. 544. At present the *Lex Anastasiana* has no application to obligations payable to bearer, but whether at present it is applicable to bills of exchange is doubtful: *Rahn*, über die unzulässigkeit der Einrede des Anastatischen Gesetzes gegen Wechselforderungen, Brunswick, 1802. *Contra*, *Schönjahn*, über die zulässigkeit derselben, Wolfenbüttel, 1802.

paid for it with interest,¹ the debtor shall have such advantage.² And therefore the cedee must also always show how much he paid for the ceded claim, because he is only to be reimbursed the amount of such payment and interest for it.³

CHAPTER III.

OF DAMAGES⁴ AND INDEMNIFICATION.

I. IDEA OF DAMAGES.

§ 370. An obligation often originates from indemnity, and every obligation in the end is merged in a claim for indemnity when by the debtor's fault the original object of the obligation will not or cannot be accomplished. Damages (*damnum*) is the general term for every loss that one has either already suffered in his property⁵ (*damnum factum s. datum*) or that he at least fears (*damnum metuendum s. infectum*).⁶ If the damage be that our estate will be diminished, it is termed a positive damage (*damnum emergens* or *damnum* absolutely in its proper sense).⁷ On the contrary, if it be only a loss of profit to us, it is termed a negative damage (*lucrum cessans s. lucrum interceptum*).⁸ Both together are often termed in the Roman law *id quod interest*.⁹ By this expression that is designated which one can claim as indemnity besides the true value of the thing damaged or destroyed (*quanti ea res est*).¹⁰

¹ If the sum paid with the addition of the interest for it (from the day of payment) equal the amount of the claim, then the whole of the latter can be demanded: Const. 22. C. 4. 35. *Contra*, *Mühlenbruch*, p. 548.

² According to the express words of the Const. 23. § 1. C. 4. 35, *Thibaut*, *System*, § 80, and *Glück*, *Comm. Vol. 16*, p. 467, *seq.* There are, however, conflicting opinions respecting this matter.

³ Compare *Thibaut*, *System*, § 80; *Mühlenbruch*, p. 605; *Unterholzner*, *Schuldverhältnisz*, Vol. 1, p. 608; *Weber*, über die Verbindlichkeit zur beweisführung, cap. 6, No. 29.

⁴ *Donellus*, *Comm. jur. civilis* Lib. 26, cap. 13–23; *Schöman*, *Lehre vom Schadensersatz*, 2 vols., Gieszen u. Wetzlar, 1806; *Wening-Ingenheim*, *die Lehre vom Schadensersatz nach Rom. Rechte*, Heidelberg, 1841. See *Bucher*, *Recht der Forderungen*, § 48–55; *Koch*, *Recht der Forder.* Vol. 1, p. 185, *seq.*; *Mohitor*, *Les obligations*, Vol. 1, p. 397, *seq.*, and the works cited in note 3, § 373, *infra*.

⁵ *Damnum*, in its wide sense, indicates every loss that one suffers in his property: fr. 1. §§ 5. 6. D. 9. 3; fr. 32. D. 19. 2; Const. 1. §§ 4. 6. C. 2. 12.

⁶ fr. 2. D. 39. 2.

⁷ fr. 3. D. 39. 2.

⁸ fr. 2. § 11. D. 43. 8. See fr. 13. pr. D. 46. 8; fr. 21. § 3. D. 19. 1; fr. 2. § ult. D. 13. 4; fr. 19. D. 10. 4.

⁹ fr. 21. 22. 23. D. 9. 2; fr. 13. pr. D. 46. 8; Cod. 7. 47; *Glück*, *Comm. Vol. 4*, § 332.

¹⁰ fr. 179. 193. D. 50. 16; fr. 1. pr. D. 19. 1; fr. 8. D. 12. 3. Sometimes, under *quanti ea res est*, the interest is also understood; i. e., the extrinsic value: fr. 4. § 7. D. 39. 2; fr. 3. § ult. D. 43. 17. On this double mode of expression, see *Savigny*, *System. Vol. 5*, p. 441, *seq.*

The obligation to indemnify for damages that one has suffered is termed *præstatio damni*.

II. CAUSE OF DAMAGES.

§ 371. The cause of damages lies—

A. Either in a casualty (*casus*),

B. Or in a voluntary act or omission of a person.

1. If the damages arise from one's self who suffered the damage, then the rule is, when one in consequence of his own fault suffers damages, it is regarded as if he had not suffered any (*quod quis exculpa sua damnum sentit non intelligitur sentire*).¹

2. If, on the contrary, the damages proceed from another, then, if it were a lawful act, the rule is that he who exercises his right injures no one (*qui jure suo utitur neminem lædit*);² or if it were an unlawful, wrongful act or omission,³ it can be charged to its perpetrator, and often founds an obligation for indemnity, not only when it consists in a fraud (*dolus*), but also in a wrong (*culpa*) or omission or delay (*mora*).

C. The damages may arise partly in the voluntary act or omission of a person and partly in a casualty without which it would not have happened (mixed casualty), in which, according to the rule, the act or omission is more regarded than the casualty.⁴

A. CASUALTY (*casus*).

§ 372. Casualty (*casus, fortuitus s. improvisus s. major casus*) is every detrimental event which could not be foreseen or avoided by him whom it affects.⁵ Therefore that which we term casualty, in the Roman law is also named *vis major, vis divini, vis naturalis fatum*.⁶ The damage apprehended from casualty is termed danger, risk, peril (*periculum*).⁷ If such a casualty happen the rule is that they who have suffered damage from it must bear it as a misfortune, and no one is bound to compensate it (*præstare damnum*)⁸ unless he had agreed to be responsible for it,⁹ or had

¹ fr. 203. D. 50. 17.

² fr. 151. 155. § 1. D. 50. 17.

³ On wrongful omissions, see § 373, beginning, *infra*.

⁴ fr. 1. § 4. D. 44. 7.

⁵ fr. 1. § 4. D. 44. 7. See fr. 15. § 2; fr. 59. D. 19. 2; fr. 2. § 7. D. 50. 8; fr. 24. § 4. D. 39. 2; fr. 3. § 1. D. 4. 9.

⁶ *E. g.*, fr. 25. § 6. fr. 33. fr. 59. D. 19. 2; fr. 11. § 5. D. 4. 4; fr. 24. § 4. D. 39. 2.

⁷ fr. 9. § ult. fr. 11. p. f. D. 12. 1; fr. 5. § 14. fr. 10. § 1. D. 13. 6; Dig. 18. 6. On this and the other meanings of *periculum*, see *Hasse, Culpa des Röm. Rechts*, §§ 77 and 78.

⁸ fr. 23. in fin. fr. 185. D. 15. 17; Const. 6. C. 4. 24; *Hepp, Die lehre von den Unglücksfällen*, Tübingen, 1838, p. 31, *seq.*; *Madai, Die lehre von der Mora*, p. 277, *seq.*; *Wolff, Zur lehre von der Mora*, p. 126, *seq.*; *Wening-Ingenheim, Vom Schadensersatz*, p. 239, *seq.*; *Unterholzner, Schuldverh.* Vol. 1, p. 511, *seq.*; *Eichmann, Vom Ersatz der Kriegsschäden*, Altenburg, 1813.

⁹ fr. 7. § 15. D. 2. 14; fr. 1. § 35. D. 16. 3; fr. 9. § 2. fr. 13. § 5. D. 19. 2.

caused the wrong (*culpa*),¹ or by a special law is bound for the payment of the damages.²

B. DOLUS AND CULPA.³

1. *Idea.*

§ 373. *Culpa*, with the Romans, comprehends all that which we term offence or misconduct; hence it comprehends every illegality, without distinction, whether it result from commission (*facto*) or omission, or from the will of the doer, or only from an oversight or neglect. In this general sense *dolus* is also comprehended in the idea of *culpa*.⁴ Every conception of *dolus* and *culpa* has the common characteristic that both are illegal acts or omissions whereby damages are inflicted on another, and, on the contrary, every illegal act or omission in this sense is culpable. In general the omission of an act is no encroachment on another's rights, and hence is not illegal (culpable). When one for a particular cause is obliged to avert damage from another, he dare not omit that act whereby such damage would be averted; if, notwithstanding, he omit it, then he acts contrary to his duty and the rights of another, and therefore is culpable. The various degrees of *culpa*, in this wide sense, relate to the terms *dolus*, *culpa*, in their narrow sense, etc., on which is to be observed—

1. *Dolus*, in its narrow sense, is intentional wrongfulness, whether it consist in injurious acts or in the omission of acts by which one for a special cause was obliged to avert damage from another; provided that the wrongful intention proceeded from one who is wickedly disposed; *e. g.*, an inclination to wrongful gain or malice.⁵

2. *Lata, latior s. magna culpa*, is a gross oversight in a positive act or in an omission of the kind above referred to. The omission is gross when

¹ fr. 1. § 4. D. 44. 7; § 2. I. 3. 14. (15); fr. 14. § 1. D. 16. 3; fr. 5. §§ 4. 7. D. 13. 6; fr. 11. § 1. D. 19. 2; fr. 23. 82. § 1. D. 45. 1.

² *E. g.*, in the case of a quadruped (*noxa* and *pauperies*): Inst. IV. 8. 9; Dig. IX. 1. 4.

³ *Donellus*, commentar. jur. civ. Lib. 16, cap. 7; *Lebrun*, Essai sur la prestation des fautes, Paris, 1764, afterwards issued with a dissertation on it by *Pothier*, Paris, 1813; *Hasse*, die culpa des Römischen Rechts, 2d ed. by *Bethmann-Hollweg*, Bonn, 1838; *Gensler*, Beitrag zu der Lehre von der Diligenz und Culpa, Heidelberg, 2d ed. 1828; *Fried. Hänel*, Lehre vom Schadensersatz, Leipzig, 1823, § 11–60; *F. Mommsen*, Beiträge zum Obligationenrecht, 3 parts, Brunswick, 1855; *Wening-Ingenheim*, Vom Schadeners. p. 82, *seq.*

⁴ fr. 5. § 1. D. 9. 2; fr. 15. § 46. D. 47. 10; Const. 11. § 1. C. 5. 17; Const. 11. C. 7. 32; Cicero in Verrem, Lib. 2. orat. 5. cap. 17; Livy, Lib. 1. c. 28; Tacitus, Annal. Lib. 1. c. 51; Ulpian, VI. 10.

⁵ fr. 2. D. 2. 2; fr. 8. pr. D. 2. 13; fr. 15. § 1. D. 5. 1; fr. 31. D. 9. 2; fr. 7. pr. D. 26. 7; fr. 3. § 5. D. 26. 10; fr. 50. § 4. D. 47. 2; fr. 47. pr. fr. 55. fr. 167. § 1. D. 50. 17; Const. 11. C. 4. 35; Const. 11. in f. C. 5. 14; Const. 7. C. 5. 51; Const. 2. C. 5. 53. See note 3, p. 298.

one omits the caution of an ordinary person (*dissoluta negligentia, nimia securitas*),¹ or when one as to another's affairs does not practice the same caution which he observes in his own.² Besides this, a wrong is regarded as being purposely perpetrated when it arises not from an act bad in itself, but from an unreasonable motive, as, *e. g.*, from misplaced sympathy.³ The *lata culpa*, also termed *culpa dolo proxima*,⁴ in relation to the obligation for the compensation of damages, in general is the same as *dolus* in its narrow sense, and is therefore also termed *dolus* in its wide sense.⁵

3. The term *culpa*, without addition, when not used in the above-mentioned wide sense,

a. Signifies primarily every wrongful infliction of damage which is not a *dolus* in its limited sense.

b. But especially only those wrongful inflictions of damages which arise from oversight, and which are not gross, but yet would be avoided by a careful family father (*diligens* or *diligentissimus paterfamilias*),⁶ wherefore it is also termed *levis culpa*.⁷ *Culpa*, in this sense, indicates a wrongful infliction of damages which is not *dolus* in its wide sense; *i. e.*, neither *dolus* in its narrow sense nor a *lata culpa*.

4. The strictness which is necessary to avoid the commission of a *culpa*⁸ is termed *diligentia*, and in its narrow sense it is the strictness which is necessary to avoid the commission of a *levis culpa*,⁹ or, in other words, that which is also termed *exacta diligentia*.¹⁰ A particular kind of *diligentia* is the *custodia*, by which in the Roman law is understood that *diligentia* which must be exercised in the custody of another's property, and which therefore includes that the thing shall not be secretly eloiigned or usucapioned.¹¹

¹ fr. 30. § 3. D. 9. 2; fr. 29. pr. D. 17. 1; fr. 213. § 2. fr. D. 50. 16.

² fr. 32. D. 16. 3; fr. 22. § 3. D. 36. 1.

³ fr. 7. pr. D. 16. 3; fr. 7. § 7. D. 4. 3; fr. 8. § 10. D. 17. 1.

⁴ fr. 8. pr. D. 2. 13; fr. 47. § 5. D. 30; fr. 4. D. 27. 8; fr. 11. D. 47. 9.

⁵ fr. 5. § 2. D. 13. 6; fr. 17. §§ 1. 2. D. 19. 5; fr. 108. § 12. D. 30; fr. 23. D. 50. 17; fr. 8. § 3. D. 43. 26.

⁶ See note 5 and § 3. I. 4. 14. (4. 15); fr. 11. D. 3. 5; Const. 11. C. 4. 35.

⁷ fr. 65. pr. D. 7. 1; fr. 14. D. 13. 7; fr. 11. D. 18. 6; fr. 54. pr. D. 19. 1. The term *levissima culpa* appears in fr. 44. pr. 9. 2.

⁸ §§ 9. 3. 25. (3. 26); fr. 72. D. 17. 2; fr. 47. § 5. D. 30.

⁹ fr. 4. § 1. fr. 68. pr. D. 18. 1; fr. 4. D. 27. 5; fr. 3. § 5. D. 49. 14; fr. 6. D. 50. 8; Const. 11. in f. C. 5. 14.

¹⁰ These and similar terms are found in §§ 2. 4. I. 3. 14. (3. 15); § 1. I. 3. 27 (3. 28); fr. 25. § 16. D. 10. 2; fr. 18. pr. D. 13. 6; fr. 11. D. 18. 6; fr. 1. § 4. D. 44. 7; Const. 24. C. 4. 32. There is much controversy respecting the diligence that one observes in his own affairs: § 9. I. 3. 25. (3. 26); fr. 72. D. 17. 2; fr. 25. § 16. D. 10. 2; Const. 11. in f. C. 5. 14. See *Hasse*, *Culpa*, § 52; *Hänel*, *Schadensers*, §§ 29, 30.

¹¹ § 18. I. 4. 1; § 3. I. 3. 23. (24); *Löhr*, *Beiträge zur Theorie der Culpa*, p. 163; *Hasse*, §§ 76, 81, *seq.*, § 91.

2. *Rules on the Reparation of Culpa.*

§ 374. The following are the general rules for compensation for damage caused by culpable acts or omissions (*præstatio culpæ*):

A. If he who damages another's thing does not stand with that other in any obligatorial relation respecting the thing, then it depends on—

1. When the damages resulted from omission, he is not liable (§ 373, *supra*).

2. But if the damages were produced by a positive act, then he is liable if the requisites for an action by the Aquilian law exist,¹ though he had committed only a *levis culpa*.²

B. If he who possessed another's property as if it were his own damaged it, and an action *in rem* is instituted against him, then is to be distinguished—

a. If he knew that it was another's property, he is absolutely bound to compensate for all damages caused by his act or omission, without reference to the manner or degree of his culpability.

b. But if he did not know that it was another's thing, but in good faith believed it to be his own, then in such case, previous to the institution of suit respecting the thing, he is not liable for damages, not even for those committed,³ but after suit he is liable for damages resulting from omission or commission.⁴

C. If one stands in an obligatorial relation to another respecting a thing, then he is—

1. Absolutely and unconditionally liable to compensate the damages inflicted on the thing by his *dolus*,⁵ and it is not permitted to agree that for the future he shall not be liable for *dolus* (*ne dolus præstetur*),⁶ but the injured party may compromise the damages suffered with the wrongdoer, and release him from the obligation to compensate them.⁷

2. *Dolus*, in its narrow sense, is here the same as *lata culpa*.⁸

3. In relation to *levis culpa*—

a. Either that which the parties have precisely agreed on is the rule,⁹ if the agreement be not contrary to a legal prohibition;¹⁰

b. Or if the parties have not agreed, then the legal rules govern;¹¹ these, however, vary greatly, and hence must be specially applied to the several cases. In *stricti juris* actions no distinction is made between *dolus*, *lata* and

¹ See § 486, *seq.*, *infra*. And also when the requisites for another action for a delict exist.

² fr. 44. pr. D. 9. 2.

³ fr. 31. § 3. D. 5. 3.

⁴ fr. 29. § 11. fr. 25. § 7. D. 5. 3.

⁵ fr. 59. § 1. D. 17. 1; Const. 4. C. 4. 10; fr. 18. § 3. D. 39. 5.

⁶ fr. 27. §§ 3. 4. D. 2. 14; fr. 1. § 7. D. 16. 3; fr. 17. pr. D. 13. 6; fr. 23. D. 50. 17; fr. 11. § ult. D. 19. 1.

⁷ fr. 27. § 3. fr. 7. § 14. D. 2. 14; fr. 5. § 7. D. 26. 7.

⁸ fr. 1. § 1. D. 11. 6. fr. 29. pr. D. 17. 1; fr. 32. D. 16. 3; fr. 226. D. 50. 16.

⁹ fr. 11. § 1. D. 19. 1; fr. 1. § 10. D. 16. 3.

¹⁰ *E. g.*, fr. 6. D. 23. 4.

¹¹ fr. 23. D. 50. 17.

levis culpa,¹ but in *bonæ fidei* actions, in general, regard must be paid whether the wrongdoer stands in such relation to the injured that by entering into it he intended to favor the latter, or in a relation by which he sought his own interest,² and whether in the latter case both parties had a common interest or not.³

c. In all cases where a claim is founded on a full compensation for damages, he who is bound to pay the whole of it has, in general, only to pay the injured his alleged lost profit, when the deprivation of it was the immediate consequence of the wrongful act of the former, but not for those only resulting from the happening of extraordinary events.⁴

3. Proof of the Offence.

§ 375. If damages be demanded by an action from one because of his wrongful commission or omission in one of the preceding obligatorial relations, then it depends⁵—

1. Whether he is to be responsible for every *culpa*, or only for *dolus* and *lata culpa*; in the former he must show that he exercised all possible care and that the damage arose from an unavoidable casualty.⁶

2. In the latter, he who claims damages must show that the defendant caused the damage by *dolus* or *lata culpa*.⁷

4. Proof of the Extent of the Damages.

§ 376. The extent of the damages that one has suffered by another must always be shown by him who claims compensation.⁸ Sometimes it may be submitted to his assessment oath (*juramentum in litem*), i. e., he can be permitted to estimate the extent of the damages he suffered in money, and to swear that it amounts to a certain sum; this, however, is subject to judicial discretion. In general this oath is only permissible when an *arbitraria* or *bonæ fidei* action has been instituted, the purpose of which is for restitution or exhibition, and the defendant, either from disobedience (*contumacio*) or from *dolus* or *lata culpa*, has rendered restitution or exhibition impossible.⁹

¹ In other respects sometimes the debtor is in these less strictly held than in *bonæ fidei* actions: fr. 91. pr. D. 45. 1.

² fr. 5. § 2. fr. 10. § 1. fr. 12. D. 13. 6; fr. 17. § 2. D. 19. 5.

³ fr. 25. § 16. D. 10. 2; fr. 72. D. 17. 2; fr. 17. pr. D. 23. 3.

⁴ § 10. I. 4. 3; fr. 29. § 3. fr. 23. § 2. D. 9. 2; fr. 11. D. 10. 4.

⁵ The rule in div. 1 applies also when they who are responsible for every *culpa* are sued in an action *in rem*.

⁶ fr. 9. § 4. D. 19. 2; Const. 5. C. 4. 24; fr. 1. § 13. D. 27. 8; fr. 11. D. 22. 3; fr. 11. D. 18. 6.

⁷ fr. 18. § 1. D. 22. 3.

⁸ § 7. I. 3. 15. (3. 16); fr. 11. D. 46. 5. The judge must determine it: fr. 11. pr. D. 10. 4; fr. 4. § 4. fr. 5. § 3. D. 12. 3; Const. 4. C. 4. 49.

⁹ Dig. 12. 3; Cod. 5. 53. A kind of this *juramenti in litem* is the *juramentum Zenonianum*: Const. 9. C. 8. 4; cap. ult. X. 1. 40; *Donellus*, Comm. jur. civ. Lib. 26,

C. DELAY (*mora*).¹1. *Idea and Kinds.*

§ 377. Delay, in a technical sense,² is the postponement of the realization of a debt which the debtor or the creditor suffers, and which may be to their disadvantage. It consists—

1. On the part of the debtor (*mora in solvendo*), when he does not perform his duty at the proper time, which may also be—

a. By wrongful occupancy of a thing.³ The delay commences at the moment of the fault and continues till the restitution of the thing.

b. By non-performance of every other debt when the time for its performance has arrived. Therefore when the time for the performance has been determined by law, convention or testament, at the expiration of the term the delay commences of itself without reminding the debtor (*dies interpellat pro homine*).⁴ If, on the contrary, no time has been appointed, then the delay arises generally at the moment that the debtor was reminded.⁵ The delay which arises only after reminder, according to the language of the sources, is termed *ex persona*; that which arises without reminder is termed *ex re*.⁶

2. On the part of the creditor (*mora in accipiendo*), there may be a delay by the refusal of acceptance of proffered performance by the debtor at the right time and at the proper place;⁷ by refusal to give a particular statement of an item of debt to the debtor when demanded by him; and there may be a delay in that the creditor was not at the appointed time and place to receive the payment.⁸

cap. 6-12; Glück, Comm. Vol. 12, § 813; Meyer, Diss. de juramento in litem, Göttingen, 1805; Müller, Versuch über die Schätzungseid, Jena and Leipzig, 1806; Wirsching, Versuch einer neuen Theorie über das juramentum in litem, Landshut, 1806; Drummer, Theorie des Würderungseides, Bamberg u. Würzburg, 1806; Sarigny, System, Vol. 5, §§ 221, 222.

¹ It is also termed *frustatio*, fr. 37. D. 17. 1; fr. 3. § 4. D. 22. 1; and *cessatio* or *dilatio*, fr. 17. pr. fr. 21. D. 22. 1. See Löhr, Theorie der culpa, p. 176; Ratjen, De mora secundum juris Romani principia comm. prior, Kiliae, 1824; Madai, Die Lehre von der Mora, Halle, 1837; Wenig-Ingenheim, vom Schadensers, p. 192, seq.; Koch, Recht der Ford. p. 391, seq.; Wolff, zur Lehre von der Mora, Göttingen, 1841; Molitor, Les obligations, Vol. 1, p. 225, seq.

² In a vulgar sense every delay is termed *mora*. See, e. g., fr. 24. pr. D. 22. 1, where this term first appears in a vulgar and then in a technical sense. Two technical meanings of *mora*, namely, a *mora* in objective and a *mora* in subjective sense (the true *mora*), are taken by Wolff, *supra*.

³ fr. 8. § 1. D. 13. 1; fr. 20. D. 13. 1.

⁴ fr. 5. D. 12. 1; fr. 114. D. 45. 1; fr. 47. D. 19. 1. fr. 5. pr. D. 50. 10; Const. 12. C. 8. 38.

⁵ fr. 32; pr. D. 23. 1.

⁶ fr. 32. pr. cit. See fr. 5. D. 4. 4; fr. 23. § 1. fr. 38. § 1. D. 22. 1; fr. 3. § 2. in f. D. 31. 1; fr. 26. § 1. D. 40. 5; Const. 3. C. 2. 41; Const. 7. C. 4. 7.

⁷ fr. 72. pr. D. 46. 3; fr. 73. § 2. fr. 122. pr. D. 45. 1. fr. 39. D. 50. 17; Const. 6. C. 4. 32.

⁸ fr. 18. pr. D. 13. 5.

3. To establish the delay of the debtor it is requisite that he should not have particular cause for excuse,¹ and that he be not guilty of a *culpa*.² The delay of the creditor, on the contrary, with its legal consequences, is not avoided by any ground of excuse.³

2. The Effect of Delay.

§ 378. The effect of the delay

1. Of the debtor is that from the moment of the delay compensation must be made for the products of the thing, interest be paid for the delay, and, in general, compensation must be made for all of the consequences of the delay;⁴ from which follows that the debtor is responsible for the casual damages⁵ if he cannot prove that even if the matter were performed it would have been of no avail and would not have been advantageous to the creditor.⁶

2. The delay of the creditor⁷ frees the debtor from its detrimental consequences.⁸ He is then no longer responsible for *culpa*, but only for *dolus*,⁹ and the risk of the thing, if the debtor otherwise had to bear it, must now be borne by the creditor, and without distinction whether it be a *species* or a *genus* or a quantity of the object of the debt.¹⁰

3. If one party succeed the other in delay,¹¹ then the earlier delay is nulli-

¹ *E. g.*, fr. 5. D. 12. 1; fr. 13. pr. D. 16. 3; fr. 3. pr. fr. 9. § 1. fr. 17. § 3. fr. 21-23. pr. fr. 24. pr. D. 22. 1; fr. 18. § 1. D. 18. 6; Const. 24. C. 8. 45. Generally much is left to the judicial discretion: fr. 32. pr. D. 22. 1; fr. 91. § 3. D. 45. 1. The bare lack of pecuniary means does not affect the maturity and actionableness of the claim (fr. 137. § 4. D. 45. 1), nor does it affect the delay.

² fr. 9. § 1. fr. 24. pr. D. 22. 1; not to the contrary are fr. 3. § 4. D. 19. 1; fr. 137. § 4. D. 45. 1; fr. 18. pr. D. 13. 5.

³ fr. 18. pr. D. 18. 5; fr. 3. § 4. D. 19. 1; not to the contrary are fr. 72. pr. D. 46. 3; fr. 17. D. 13. 5.

⁴ fr. 8. § 6. D. 43. 26; fr. 17. § 1. D. 6. 1; fr. 19. D. 18. 6; fr. 3. pr. fr. 17. §§ 3. 4. fr. 32. § 2. fr. 34. fr. 41. pr. D. 22. 1; fr. 1. pr. fr. 3. § 3. fr. 21. § 3. D. 19. 1. On the case when the price was increased or diminished, see *Mommsen*, Beitr. § 21.

⁵ fr. 82. § 1. D. 45. 1; fr. 39. § 1; fr. 108. § 11. D. 30; fr. 14. D. 23. 3; fr. 5. D. 12. 1; Const. ult. C. 4. 7. This is referred to when the sources say, "delay perpetuates the obligation:" fr. 91. § 3. D. 45. 1; fr. 24. § 2. D. 22. 1; fr. 173. § 2. D. 50. 17.

⁶ fr. 14. § 1. D. 16. 3; fr. 12. § 4. D. 10. 4; fr. 47. § 6. D. 30; *Glück*, Comm. Vol. 4, p. 414. This exception is, however, greatly contested.

⁷ See, generally, *Mommsen*, § 30.

⁸ fr. 7. D. 22. 1; fr. 39. 161. D. 50. 17. But if before the creditor's delay he owed interest for another reason and desires to stop its further running, he must legally deposit the money; the simple tender of the money does not free him: fr. 7. D. 22. 1; Const. 6. 9. C. 4. 32. See *Mommsen*, § 36.

⁹ fr. 5. 17. D. 18. 6; fr. 9. D. 24. 3.

¹⁰ fr. 105. D. 45. 1; fr. 72. pr. D. 46. 3.

¹¹ A contemporaneous delay of the creditor and debtor which permits compensation to be made is often spoken of: fr. 17. D. 18. 6; fr. 51. pr. D. 19. 1; arg. fr. 39. D. 24. 3; fr. 3. § 3. D. 2. 10; fr. 36. D. 4. 3. *Madai*, Die Lehre von der Mora, Halle, 1837, § 70, shows that a contemporaneous delay cannot happen. See *Mommsen*, § 36.

fied and the later is to the detriment of him who caused it (*posterior mora nocet*); however, he does not lose the right which he acquired from the earlier delay.¹ A creditor's accessorial claim arising from the delay of the debtor must always be enforced at the same time with the action for the principal thing.²

3. End of the Delay.³

§ 379. The delay ceases (*mora purgatur*)

1. On the part of the debtor as soon as he has declared his readiness to perform his duty, and the relations are still unchanged (*res integra*),⁴ or when the creditor grants to him a new term.⁵

2. On the part of the creditor the delay becomes condoned as soon as he has declared his readiness to accept the performance and calls on the debtor for the fulfillment of his obligation.⁶

3. On the part of the debtor, as well as of the creditor, the delay ceases when the debt is extinguished by payment, novation, or in any other way.⁷

III. INTEREST.

A. NOTION.

§ 380. There often arises from obligations, besides the performance of the principal object, the payment of interest.⁸ By interest (*usuræ*) is understood that which one is obliged to give according to a certain measure in things of a like kind as a compensation for permitting him to use, or in delaying the use to another of a quantity of fungible things which he owes to the other.⁹ The quantity for use of which interest is paid is termed the capital or principal (*sortis, caput, summa crediti, debiti quantitas, principale debitum*). Interest is always based on a principal debt, and ceases with it.¹⁰

¹ fr. 17. D. 18. 6; fr. 37. D. 17. 1; fr. 7. D. 22. 1; fr. 51. § 1. D. 19. 1; fr. 26. D. 24. 3; fr. 91. § 3. fr. 135. § 2. D. 45. 1.

² fr. 49. § 1. D. 19. 1; Const. 4. C. 4. 34; Const. 13. 26. pr. C. 4. 32.

³ *Mommsen*, § 34-36.

⁴ fr. 73. § 2. fr. 91. § 3. D. 45. 1.

⁵ fr. 8. pr. D. 46. 2.

⁶ fr. 7. in fin. D. 22. 1.

⁷ fr. 14. pr. fr. 15. fr. 31. pr. D. 46. 2.

⁸ Paul, 2. 14. Dig. 22. 1; Cod. 4. 32; 5. 56; 7. 54; Novels 32. 33. 34. 121. 138. The first and the last three of these Novels are not glossed. *G. Noodt*, De fœnore et usuris libri III., in his works, Vol. 1; *Glück*, Comm. Vol. 21, § 1129-1138; *Fritz*, Erlaut. Vol. 2. pt. 1. p. 20. *seq.*, p. 101, *seq.*; *Koch*, Recht der Forder. Vol. 1, p. 87, *seq.*; *Schilling*, Lehrb. der Instit. Vol. 3. See *Savigny*, System, Vol. 6, p. 122, *seq.* On the Roman mode of computation of interest, see, particularly, *Niebuhr*, Roman Hist. Vol. 3; *Hipp.* De fœnore veterum Romanorum, Hamburg, 1828.

⁹ fr. 17. § 3. D. 22. 1; fr. 13. § 20. D. 19. 1. Interest is not only given for money, but also for other fungible things, such as oil and grain as over-measure (*additamentum*): Const. 23. C. 4. 32.

¹⁰ According to the predominating view, by the payment of interest under certain

B. BASIS OF INTEREST.¹

§ 381. The obligation to pay interest is always founded on an especial ground. This is—

I. On an immediate provision of the law (*usuræ legales*).

A. Which may be by a general provision (*in jure communi*). Therefore one for whose benefit another's money was expended not only must repay it, but also pay the interest from the time of the expenditure,² and hence when the purchaser of a thing is not credited with its price, interest must be paid from the time of the delivery of the thing.³ There are cases in which by non-payment the purchaser will not be liable for the delay.⁴

B. As a particular favor to the creditor (*in jure singulari*), one must pay interest on the debt due to a minor for each deferred payment, even if there be no delay.⁵

II. Interest also arises from obligatorial transactions. This may be—

A. By convention (*usuræ conventionales*).⁶

B. By a unilateral act, which is divided into—

1. A lawful act, such as pollicitation,⁷ or a testament (*usuræ testamentariæ*).⁸

2. Or an unlawful act, which includes—

a. The delay of the debtor (*usuræ ex mora*) when the claim produces a *bonæ fidei* action⁹ or is based on a legacy.

b. When one, unauthorized, expends another's money for one's own benefit.¹⁰

c. When one on whom rests the management of another's capital neglects to invest it to produce interest.¹¹

III. By the payment of interest for many years under certain circumstances the presumption will be founded that a legal ground for interest

circumstances a presumption will be raised of the existence of the corresponding principal debt: fr. 6. D. 22. 1. See, e. g., Glück, Vol. 21, p. 74. Though this interpretation of fr. 6. D. 22. 1. cit. is doubted by some. On fr. 6. cit. see also *infra*, note 1, p. 305.

¹ Weber, Versuche über das Civilrecht, No. 3.

² fr. 19. § 4. D. 3. 5; fr. 12. § 9. D. 17. 1.

³ fr. 13. § 20. D. 19. 1; fr. 18. § 1. D. 22. 1; Const. 5. C. 4. 49; Const. 2. C. 4. 32; *Fragm. Vat.* § 2.

⁴ Because he withholds payment in consequence of a threatened eviction or attachment of the thing; yet he can avoid the payment of interest by a legal deposit of the money: fr. 7. D. 22. 1; Const. 6. 9. C. 4. 32.

⁵ fr. 87. § 1. D. 31; Const. 3. C. 2. 41; Const. 5. C. 4. 49.

⁶ Const. 4. C. 42.

⁷ fr. 10. D. 50. 12. Provided, that a bare pollicitation for the founding of a principal debt is exceptionally sufficient.

⁸ fr. 3. § 6. D. 33. 1.

⁹ fr. 24. D. 16. 3; fr. 32. § 2. D. 22. 1; Const. 2. C. 4. 34.

¹⁰ fr. 28. D. 16. 3; fr. 1. § 1. D. 22. 1; fr. 7. §§ 10. 12. D. 26. 7; fr. 38. D. 3. 5; fr. 10. § 3. D. 17. 1.

¹¹ fr. 19. § 4. D. 3. 5; fr. 7. § 3. fr. 10. fr. 15. fr. 58. § 1. D. 26. 7.

exists,¹ and he who permits the payment of interest in advance for a certain time cannot redemand the capital previous to the expiration of this time.²

C. RATE AND LEGAL LIMITATIONS OF INTEREST.

§ 382. On the amount of interest to be paid, it is to be observed—

1. That its rate³ depends on the obligation for interest fixed by the convention or another legal act. But by the law of Justinian,⁴ *personæ illustres* and all persons of the higher order could not contract for more than four per cent., merchants and manufacturers not more than eight per cent., all others not more than six per cent.; nor could they take more than these rates from a

¹ fr. 6. D. 22. 1; Glück, Comm. Vol. 21, p. 51.

² fr. 57. D. 2. 14; fr. 2. § 6. D. 44. 4.

³ Interest was computed by the Romans (at least in the latter time of the republic and subsequently) according to months, because it was payable monthly on the first day of the month (Kalendæ). It was fixed according to per centum, i. e., according to hundred parts of the capital. Interest of one of a hundred (one per centum) was termed *centisimæ usuræ*. See, e. g., fr. 4. § 1. D. 22. 2; Const. 26. § 1. C. 4. 32. Often a part of a per centum is spoken of; here the Romans proceed as in other respects, e. g., in the designation of the shares of an inheritance, from their division of the whole (*as*) in 12 *unciæ*, and designate $\frac{1}{12}$ as *uncia*, $\frac{2}{12}$ or $\frac{1}{6}$ as *sextans*, $\frac{3}{12}$ or $\frac{1}{4}$ as *quadrans*, $\frac{4}{12}$ or $\frac{1}{3}$ as *triens*, $\frac{5}{12}$ as *quincunx*, $\frac{6}{12}$ or $\frac{1}{2}$ as *semis*, $\frac{7}{12}$ as *septunx*, $\frac{8}{12}$ or $\frac{2}{3}$ as *bes*, $\frac{9}{12}$ or $\frac{3}{4}$ as *dodrans*, $\frac{10}{12}$ or $\frac{5}{6}$ as *dextans* or *decunx*, and $\frac{11}{12}$ as *deunx* (i. e., *as dimidia uncia*): § 5. I. 2. 14. The translation from the Roman usage of language into the present usage is thereby much facilitated, in that the year according to which we compute interest contains precisely as many months as the *as* has *unciæ*. As many twelve parts of a per centum (*unciæ*) as depend on a month so many whole per centum there are in a year. According to which there are *usuræ trigesimæ* or *tertia pars centisimæ* = 4 per centum, *usuræ semissæ* or *semisales* or *dimidia pars centisimæ* = 6 per centum, *usuræ beses* or *bes centisimæ* = 8 per centum.

⁴ In the earlier times it is to be observed that the twelve tables permitted the *uncentarium fenus*, wherein with Niebuhr, Rom. Hist. Vol. 3, must be understood $\frac{1}{12}$ = 8 $\frac{1}{3}$ per centum annually. This provision was reiterated towards the end of the fourth century U. C. in the *lex Duilia Mœnia*. A plebiscit of the year 408 against it only permitted the *semmunciarium fenus*, and a new one, the *lex Genucia* of the year 413, forbade interest entirely among Roman citizens; yet as it appears it did not declare the convention for interest a nullity, but only threatened the one receiving interest with a private penalty. By means of partnership (*socii*) this law was often avoided, till its provisions were extended to it by the *lex Sempronia* of the year 561: Tacitus, Annal. VI. 16; Livy, VII. 16. 27. 42; Gaius, IV. §§ 2. 3. In the seventh century, by a *senatusconsultum* and then by a plebiscit, the *lex Gubina*, the Romans were forbidden to lend money at interest to the provincial cities: Cicero ad Attic. V. 21; VI. 2; *Sorigny*, on the usury of M. Brutus, in his verm. Schriften, Vol. 1, No. 13. At the same time, principally through the magisterial edict (Cicero, c. I. 12, V. 21), the state of affairs was formed which substantially existed till Justinian's new ordinance. Interest was now again permitted, but a maximum was fixed which generally could not be exceeded by any legal act. This *maxima* or *legitima usura* was the *centesima*: Paul, S. R. II. 14. §§ 2. 4; Const. 1. 2. C. Th. 2. 23. On the history of the Roman interest rate, see Puchta, Inst. Vol. 3, § 261; Schilling, *supra*, p. 111, *seq.*

unilateral transaction.¹ The rate of the other interest² is only legally fixed exceptionally, and sometimes it was six per cent.,³ sometimes only four or three per cent.,⁴ and finally it was even twelve per cent.⁵ But in most cases the judge determined it, and therefore had usually to see⁶ what was customary in the community.⁷ But yet he could not exceed the rate of interest contracted.⁸

2. Besides these there are the following limitations in regard to interest:

a. The interest in arrear exceeding the capital sum (*usuræ ultra alterum tantum*) cannot be demanded.⁹

b. Interest on interest is not permitted to be taken (*usurarum usuræ s. anatocismus*). It may be agreed that the interest may be added to the capital (*anatocismus conjunctus*), or that the debtor shall pay interest for it as new capital (*anatocismus separatus*).¹⁰ An *anatocismus* exists only when the same debtor pays the same creditor interest on interest which he owes to him. It is therefore no *anatocismus* when the creditor lends the interest which he

¹ Const. 26. § 1. C. 4. 32. In two cases in which formerly the *centisimæ* could be exceeded, Justinian exceptionally permits *centisimæ usuræ*, hence 12 per centum annually, namely, in the *nauticum fœnus* (§ 433, *infra*), and when the capital consists not in money but in products (*species*). In Germany proper interest was formerly forbidden, but this began to be gradually changed in the sixteenth and seventeenth centuries: *Fritz*, p. 46, *seq.* Where the common law exists the practice wavers between five and six per centum: *Hufeland*, Beiträge zur Berichtigung und Erweiterung der positiven Rechtswissenschaften, St. 1, No. 2; *Gütschen*, Grundr. p. 210–215: *Fritz*, *supra*, particularly p. 50, *seq.*

² *Fritz*, p. 40, *seq.*

³ fr. 17. § 6. D. 22. 1.

⁴ Only four per centum: Const. 31. § 2. C. 5. 12; Const. un. § 7. C. 5. 13; Novel 2. c. 4; Novel 22. c. 44. §§ 4. 7. 8; Novel 34. c. 1. Only three per centum: Const. 12. pr. C. 3. 31.

⁵ Const. 2. 3. C. 7. 54; Const. 4. C. 8. 10. Yet compare, on the last passage, *Schilling*, p. 121, note vv. By the fr. 38. D. 3. 5. and fr. 54. D. 26. 7, according to Justinian law not more than twelve per centum is to be understood; see thereon *Fritz*, p. 43, *seq.*

⁶ On other circumstances that are sometimes restrictive, see, *e. g.*, fr. 10. § 3. fr. 12. § 9. D. 17. 1.

⁷ fr. 1. pr. fr. 37. D. 22. 1; fr. 7. § 10. D. 26. 7; fr. 3. § 1. D. 27. 4; fr. 39. § 1. D. 30.

⁸ See note 7 and Const. 26. § 1. C. 4. 32.

⁹ Const. 10. C. 4. 32. See Const. 27. § 1. C. *ibid.*; fr. 26. § 1. D. 12. 6. By later laws, Const. 29. 30. C. *ibid.*, Novel 121. 138, this was also extended to interest paid successively; but these laws are not glossed and therefore are not valid in Germany.

¹⁰ This prohibition, which in Cicero's time at least was not universal, Cicero *ad Att.* V. 21. §§ 11. 13; VI. 1. § 5; VI. 3. § 5, exists already in fr. 26. § 1. D. 12. 6; fr. 27. D. 42. 1; Const. 20. C. 2. 12. But Justinian also prohibited a convention which related to the future payment of interest on which interest was already payable before the convention was made: Const. 28. C. 4. 32; he also first forbade interest on the judgment for interest for which the debtor was condemned: Const. 3. C. 7. 54; comp. with Const. un. C. Th. 4. 19; *Pufendorf*, *Observ. jur. univ.* T. 1, obs. 14; *Zimmerman*, Über Anatocismus und Interusurium, Frankfurt, 1798.

received from his debtor to a third person as capital, or when one must pay interest on interest that belongs to another.¹

3. All acts which seek to avoid the foregoing prohibitions of taking of interest are invalid.² The excess promised need not be paid; if it be already paid, the debtor has either the capital in his hands or not. In the first case the capital *ipso jure* becomes reduced to the extent of the excess of payment; in the latter the excess can be reclaimed with the *condictio indebiti*.³

D. INTERUSURIUM.

§ 383. *Interusurium*, or use during the interval (*commodum mediū temporis*), indicates in a wide sense the benefit of the object of a claim before it is due.⁴ That which a claim is worth less at present because it is not payable till a future time, and not bearing interest in the interval, is termed *commodum representationis* (use of an immature claim).⁵ In general a creditor cannot be compelled to accept the payment of an immature demand, with the deduction of the interest for the unexpired time. Notwithstanding it frequently happens that this kind of interusury must be computed;⁶ but according to which principle it is to be computed when the parties have not fixed it by convention or another legal act is much disputed.⁷

SECOND SECTION.

OF THE ORIGIN OF OBLIGATIONS.

GENERAL VIEW.

§ 384. An actionable obligation can arise—

1. From conventions (*contractus* and *pacta*).⁸
2. From wrongful acts and omissions (*delicta, maleficia*).
3. From various other legal causes, which especially include the obligations *quasi ex contractu* and *quasi ex delicto* and many others.⁹

¹ See fr. 7. § 12. fr. 9. § 4. D. 26. 7.

² fr. 44. D. 22. 1; Const. 26. § 1. C. 4. 32.

³ Const. 18. 26. § 1. C. 4. 32; fr. 26. §§ 1. 2. D. 12. 6.

⁴ fr. 9. § 8. D. 15. 1; fr. 24. § 2. D. 24. 3; fr. 1. § 10. D. 35. 2; fr. 10. § 12. fr. 17. § 2. D. 42. 8; Fritz, Erläut. Vol. 2, Pt. 1, p. 129.

⁵ See, viz., fr. 24. § 2. D. 24. 3; Fritz, *supra*.

⁶ See citations in note 4.

⁷ *Dunn*, *Über das Interusurium*, Ulm, 1823; *Zachariæ*, *Über die richtige Berechnungsart des Interusurii*, Greifswalde, 1831; Fritz, p. 132, *seq.*; *Keil*, *Das Interusurium*, Jena, 1854.

⁸ The Romans regard as the origin of obligations only the *contractus*, and not the *pacta* also. See note 9. In the exposition of the Justinian law it may be advantageous to treat of the obligatory *pacta* with the *contractus* in the same chapter.

⁹ fr. 1. pr. D. 44. 7. "Obligaciones aut ex contractu nascuntur, aut ex maleficio, aut propria quodam jure ex variis causarum figuris:" § 2. I. 3. 13. (14). "Obliga-

CHAPTER I.

OBLIGATIONS FROM CONVENTION.¹

I. IDEA OF CONVENTION.

§ 385. Convention, in general, is the agreement of two or more persons respecting a legal relation between them.² By conventions family relations and rights of property of every kind may be founded and dissolved.³ But here only conventions whereby obligations may be founded are spoken of. Such a convention presents at least two persons, of whom one promises to the other to perform some certain thing, which the other accepts.⁴ The acceptance usually follows the promise, but as a request it may precede it.⁵

II. NEGOTIATIONS, PROMISES AND VOWS.

§ 386. 1. Negotiations or preliminary transactions on the object of the convention and fixing its extent and terms differ from conventions. Negotiations are not binding so long as the convention is not concluded.⁶

2. The *pollicitation*, by which is generally understood an unaccepted promise,⁷ usually is not binding. To this there are the following exceptions:

a. When one has promised something to a state or city. In such case, the promisor and his heirs are bound if the promise were made for a special cause that has occurred or occurs afterwards; but if the promise be made not for a special cause, the promisor is not bound, unless he has already commenced its fulfillment.⁸

b. A vow (*votum*), or a sacred unilateral promise of a certain performance for a pious object, by the Roman law, bound the promisor and his heirs only when it was openly uttered;⁹ but provided always that it be for a lawful object and that it be done voluntarily by a person who can bind himself.

tiones aut ex contractu sunt aut quasi ex contractu, aut ex maleficio aut quasi ex maleficio." See Gaius, III. § 88.

¹ Paul, I. 1; Dig. 2. 14; Cod. 2. 3; *Cujas*, Comm. ad tit. Dig. de pactis, in his works, T. 1, p. 933, *seq.*, in his recitatt. in tit. Cod. de pactis, in his works, T. 9, p. 24; *Donellus*, Comment. ad tit. Dig. de V. O. et ad tit. Cod. de pactis, in his works, T. 7 et 11; *Bucher*, Recht der Forderungen, p. 26, *seq.*

² fr. 1. §§ 1. 2. D. 2. 14.

³ Excepting the right of inheritance, which, according to the Roman law, cannot be founded on convention. See *infra*, § 656.

⁴ fr. 1. §§ 2. 3. D. 2. 14; fr. 3. pr. D. 50. 12.

⁵ *E. g.*, "Titius requested and Nevius promised:" fr. 7. § 12. D. 2. 14.

⁶ Which also includes the preliminary written draft of a convention. See Const. 17. C. 4. 21.

⁷ fr. 3. pr. D. 50. 12; *Wichers*, Diss. de romano pollicitationum jure, Groningen, 1805; *Bülow*, Abh. Pt. 1, No. 11.

⁸ fr. 1. §§ 1. 2. fr. 3. pr. fr. 6. pr. fr. 9. fr. 14. D. 50. 12.

⁹ fr. 2. D. 50. 12. By the canon law a mental vow is binding as a promise made to God: c. 1. 3. C. 17. qu. 1; cap. 3. 6. X. 3. 34; cap. 18. X. 3. 39; *Walter*, Kirchenrecht, § 360; c. 1. 5. 10. 12. 13. 15. C. 22. qu. 4; cap. 1. X. 1. 40; c. 14. C. 32. qu. 2.

c. By the modern Roman law, when it relates to the constituting of a *dos* (§ 564, *infra*).

III. REQUISITES FOR A CONVENTION.

A. GENERALLY.

§ 387. Every convention whereby one obliges himself to another for a certain performance is a legal transaction. The ordinary principles of legal transactions, which are stated *supra*, § 172–188, are also generally applicable to conventions. But to a convention is especially requisite the concurrence of the wills or reciprocal agreement of the parties to it.¹ He who cannot consent is also incapable of entering into a convention, and he who for the entering into a legal transaction needs the authority of a tutor or the consent of a curator also requires this for the entering into a convention.²

B. WANT OF VOLITION.

1. *Fraud*.

§ 388. The consent of the parties to the convention must be free and earnest (§ 177, *supra*). The want of volition includes—

Fraud.³ If the error which is produced or maintained by fraud be not of a kind that aside from the fraud nullifies the convention, then is to be distinguished—

1. If one of the parties defrauded the other, and the convention be not fulfilled, the fraud can be set up by an exception. If the convention be already fulfilled, then the party defrauded has an action, whose nature depends on whether the convention relates to a matter which is *stricti juris* or *bona fidei* (see § 227, *supra*).

2. Should each party have defrauded the other, then the exception to the action for its enforcement is as permissible as if only the plaintiff had defrauded the defendant.⁴ No effectual action, on the contrary, can in such case be instituted by one of the parties against the other for rescission or for damages for the fraud.⁵

3. If the fraud were perpetrated by a third person, then the injured party can institute the action *doli*⁶ against the defrauder if he has no other legal remedy.⁷

¹ fr. 1. §§ 2. 3. D. 2. 14; fr. 3. pr. D. 50. 12.

² See *Weber*, Von der natürlichen Verbindlichkeit, § 71–73.

³ *Glück*, Comm. Vol. 4, p. 108, *seq.*; *Wening-Ingenheim*, Civilr. § 228; *Burchardi*, Wiedereins. in den vorigen stand. p. 323, *seq.*; *Koch*, Recht der Ford. Vol. 2, p. 102, *seq.*; *Savigny*, System, Vol. 7, p. 198, *seq.*

⁴ Against the *exceptio doli* no *replicatio doli* is permissible: fr. 4. § 13. D. 44. 4; fr. 154. pr. D. 50. 17. See fr. 57. § 3. D. 18. 1.

⁵ fr. 36. D. 4. 3.

⁶ Sometimes he has such an action against the other party. See, *e. g.*, fr. 18. § 3. D. 4. 3.

⁷ fr. 1. § 8. fr. 2–8. fr. 9. § 1. fr. 19. fr. 40. D. 4. 2.

2. Force.

§ 389. A convention is not *ipso jure* nullified by force (§ 180 and § 226, *supra*); but the coerced person can protect himself against the action on the convention by an exception, and also in various ways institute actions to protect himself, and it matters not whether the force proceeded from the other party to the convention or from a third party.¹ This has been stated more precisely in § 226, *supra*.²

3. Error.

§ 390. Error (§ 178, *supra*) relates—

1. To an essential circumstance, which so hinders the consent as to make the convention invalid.³ Such as the error respecting the *thing* which is the object of the convention, or of the essential quality of the thing;⁴ the error respecting the *kind* of convention;⁵ in general the error respecting the *person* of the parties to the convention,⁶ and the error respecting the *price*, but only when he who should pay it offers less than the other understood it to be.⁷

2. If the error relate only to *collateral things* it does not nullify the convention, but it sometimes has influence on its efficacy.⁸

3. The error which does not relate to the subject-matter of the convention, but only to its *motives*, has no influence on it,⁹ excepting when by the annexation of a condition another result will be produced, or the one party has closed the transaction in the belief that he is legally obliged to close it,¹⁰ or the other party caused or maintained the error by fraud (§ 388, *supra*).

4. Simulation.

§ 391. Among the causes that nullify consent is simulation (§ 181, *supra*).

1. When both parties¹¹ pretended to make a convention without intending to make one, then no convention exists.¹²

¹ Provided the third party employed the force with the view of effecting the convention. If he did not, then he has no influence on the operation of the convention: fr. 9. § 1. in f. D. 4. 2.

² Schliemann, Die Lehre vom Zwange, Rostock, 1861.

³ fr. 57. D. 44. 7; Richelmann, Einfluss des Irrthums auf Verträge, Hanover, 1837; Savigny, System, Vol. 3, p. 263, *seq.*; Koch, Recht der Forder. Vol. 2, p. 115, *seq.*; Unterholzner, Schuldverh. Vol. 1, p. 57, *seq.*

⁴ fr. 137. § 1. D. 45. 1. See fr. 9. pr. § 2. fr. 14. fr. 15. pr. fr. 16. pr. fr. 22. fr. 23. fr. 57. pr. D. 18. 1.

⁵ fr. 57. D. 44. 7; fr. 18. pr. § 1. D. 12. 1; fr. 36. D. 41. 1.

⁶ fr. 32. D. 12. 1; arg. fr. 9. pr. D. 28. 5; fr. 72. § 6. D. 35. 1; Const. 4. C. 6. 24.

⁷ fr. 9. pr. D. 18. 1; fr. 52. D. 19. 2; arg. fr. 1. § 4. fr. 83. § 1. D. 45. 1.

⁸ *E. g.*, fr. 40. § 2. D. 18. 1. See fr. 34. pr. fr. 57. pr. D. 18. 1; fr. 42. D. 19. 1.

⁹ fr. 3. § 7. D. 12. 4; fr. 65. § 2. fr. 52. D. 12. 6; fr. 18. § 3. fr. 38. D. 4. 3; fr. 49. D. 17. 1; fr. 34. pr. D. 18. 1. The fr. 9. pr. fr. 58. D. 18. 1. are not *contra*. See Savigny, Syst. Vol. 3, p. 112, *seq.*, p. 354, *seq.* ¹⁰ fr. 5. § 1. D. 19. 1.

¹¹ If only one party simulate while the other deals honestly, or if a third person simulate to the detriment of one of the parties, then the simulation is to be treated according to the rules applicable to fraud: fr. 7. § 9. D. 2. 14; fr. 49. pr. D. 19. 1.

¹² fr. 55. D. 18. 1; fr. 3. § 2. fr. 54. D. 44. 7; Const. 21. C. 2. 4.

2. But if they pretended to make a convention other than that which they intended to make, then the transaction must be determined according to the principles governing hidden agreements,¹ and is valid if it have the requisites for a convention and be not contrary to law.²

IV. CHARACTERISTICS OF CONVENTIONS.

§ 392. A convention, like any other legal transaction, may be either simple or for a term, or on condition, and the effect of such accessorial qualities is to be determined according to their general principles (§§ 184, 185, *supra*). But if the accessorial quality be for something impossible, then—

1. The affirmative impossible³ condition renders the convention invalid, without regard whether it be physically or legally impossible;⁴ the morally impossible condition is also invalid. But when one promises to pay a party on condition that he permit the promisor to do an unlawful act, such condition is not invalid.⁵

2. The negative physically impossible condition,⁶ as also the negative legally impossible,⁷ is regarded as not existing.⁸ On the contrary, the negative morally impossible condition renders the convention invalid, not only when one agrees that the promisor shall omit the doing of a certain immoral act, but also when one agrees that he himself shall omit a disgraceful act.⁹

V. EFFECT OF CONVENTIONS.

§ 393. Generally, by an obligatorial convention,¹⁰ only the parties and their heirs, and not also third persons, are empowered and bound.¹¹ This principle, however, is subject to exceptions—

1. When, either by the peculiar nature of the convention or by express

¹ Cod. 4. 22. See fr. 36. 33. D. 18. 1.

² *E. g.*, fr. 5. § 5. fr. 7. § 6. fr. 32. §§ 24. 25. D. 24. 1; *Klien*, De negotiis simulatis, Vitebergae, 1807; *Savigny*, Syst. Vol. 3, p. 257, *seq.*

³ The same is also true of the conditions which we should regard as negative impossible: *e. g.*, of the condition, if you never die. See *infra*, note 5.

⁴ § 11. I. 3. 19. (20); fr. 1. § 11. fr. 31. D. 44. 7; fr. 26. fr. 35. § 1. D. 45. 1.

⁵ fr. 50. D. 2. 14; fr. 121. § 1. D. 45. 1.

⁶ By this expression is designated, namely, the condition if a certain impossibility should not occur: *e. g.*, if you will not drink the whole of the sea. Such conditions it were better to term necessary and even negative necessary conditions. See note 3.

⁷ § 11. in f. I. 3. 19. (20); fr. 7. D. 45. 1.

⁸ *E. g.*, if you will not acquire the paternal power over your elder brother.

⁹ fr. 7. § 3. fr. 27. §§ 3. 4. D. 2. 14; fr. 123. D. 45. 1.

¹⁰ On the effect at the present day of conventions concluded by representatives, see note 4, p. 160, *supra*.

¹¹ Cod. 7. 60; fr. 74. D. 50. 17; Const. 25. C. 2. 3; Const. 13. C. 8. 38. See fr. 59. 143. D. 50. 17; fr. 52. § 1. D. 2. 14. The rights arising from conditional conventions also descend to the heirs: fr. 8. pr. D. 18. 6; fr. 57. D. 45. 1; § 4. I. 3. 15. (16); § 25. I. 3. 19. (20).

agreement, the effect of the convention is limited to the parties and does not descend to their heirs.¹

2. Another exception is applied when a third person, by the convention of two other persons, is empowered and bound. A third person can attain a right when he has the promisee in his² *potestas*,³ and he also will be bound by the acts of his agent or representative.⁴

VI. KINDS OF CONVENTIONS.

A. GENERALLY.⁵

§ 394. The conventions from which claims arise⁶ are, generally—

A. Either principal conventions, which stand by themselves, or collateral conventions, which relate to a principal convention. The latter are either those whereby the legal nature of the transaction is modified (§§ 460, 461, *infra*), or their object is to secure the rights arising from the principal convention, *e. g.*, by bail. The validity of collateral conventions is always based on the existence and the efficacy of the principal convention, so that they stand and fall with it.⁷

B. Conventions are, further, either those whereby only one of the parties promises something to the other, *e. g.*, gift, or those from which mutual obligations arise between the parties, *e. g.*, purchase, pact and hiring. To the former also belong all those *bonæ fidei* contracts⁸ by which a party in consideration of a promise to him of something, under certain circumstances must also do something in return, and can be sued for counter-performance in an action on the contract, which is termed *contraria actio*, in contradistinction from *directa actio*, *i. e.*, the usual action for the enforcement of that which was promised by the convention.⁹ In conventions which are for mutual performances, both parties can sue in *directæ* actions. Of these conventions the following general rules are especially to be observed :

¹ The former is the case in those conventions which depend on personal ability or on personal confidence. The latter can often be discovered in the terms of the convention: *e. g.*, fr. 52. § 3. D. 2. 14. At an early period obligations could not first begin with the heirs of the promisor or with the heirs of the promisee, but Justinian altered this by Const. 11. 15. C. 8. 38. See § 13. I. 3. 19. (3. 20), and in Const. un. C. 4. 11.

² According to the ancient law when he had him *in manu* or *in mancipio*.

³ Gaius, II. § 86-87; III. § 163; Inst. II. 9; III. 28. (29); § 4. in f. I. 3. 19. (20); Const. 1. 3. C. 5. 39.

⁴ Tit. Inst. 4. 7; Dig. lib. 14. et 15. See *infra*, § 512, *seq.*

⁵ *Kudhart*, Über systematische Eintheilung und Stellung der Verträge, Nürnberg, 1811.

⁶ Respecting conventions whereby claims are extinguished, see *infra*, § 537, and especially § 540-542, *infra*.

⁷ fr. 16. pr. fr. 32. fr. 46. D. 46. 1; fr. 2. D. 20. 3; fr. 6. pr. D. 20. 6; fr. 9. fr. 13. pr. D. 13. 7; Const. 1. 2. C. 8. 33.

⁸ This appears in several quasi contracts: §§ 1. 2. I. 3. 27. (3. 28).

⁹ fr. 17. § 1. fr. 18. § 4. D. 13. 6; fr. 16. § 1. D. 13. 7.

1. Generally an action can only be instituted for performance, and no party can unilaterally recede, even if the other party should not yet have fulfilled his obligation,¹ unless such right had been expressly agreed on,² or one or the other party reserved to himself repentance,³ or if, according to the circumstances, the fulfillment after the delay of the debtor would no longer benefit the creditor.⁴

2. When the order in which the mutual performances are to be made is determined by the nature of the agreement,⁵ or expressly, then such order must be observed. But otherwise it would be inequitable when one party sues for performance who has not yet performed. To such an action there is the exception *non adimpleti contractus*.⁶ The burden of proof is according to the ordinary rules which generally govern exceptions. When the claim which the defendant alleges that he has acquired by the convention on which he is sued is wholly or partly denied, then the defendant must show it. If the plaintiff allege in opposition that the claim has been extinguished by payment or in another manner, then the plaintiff must prove it.⁷

B. ACCORDING TO THE ROMAN LAW ESPECIALLY.

1. *Contracts and Pacts.*

§ 395. The division of conventions into contracts and pacts was important in the Roman law. The former were such conventions as already by the older civil law founded an obligation and action;⁸ all the other conventions were termed pacts. These generally did not produce an actionable obligation.⁹ Actionability was subsequently given to several pacts, whereby they received the same power and efficacy that contracts received (§ 397, *infra*). This Roman division of conventions into contracts and pacts is unimportant at the present day, because with us every lawful and in itself valid obligatorial convention produces an obligation and action;¹⁰ but in the exposition of the Roman law this division must not be overlooked.¹¹

¹ Const. 5. C. 4. 10; Const. 3. C. 4. 44; Const. 17. C. 2. 4; Const. 2. C. 4. 45.

² fr. 51. § 1. D. 19. 1; Dig. 18. 3; Cod. 4. 54.

³ fr. 35. pr. D. 18. 1.

⁴ Const. 6. C. 4. 54. Respecting a fourth exception which the Roman law permits, see § 444, *infra*.

⁵ This is, e. g., the case in hiring: fr. 24. § 2. D. 19. 2.

⁶ Gaius, IV. § 126; fr. 13. § 8. fr. 25. D. 19. 1; fr. 5. § 4. D. 44. 4; Const. 21. C. 2. 3; Const. 5. C. 8. 45; *Savigny*, System, Vol. 5, p. 289.

⁷ See authorities cited in note 6.

⁸ fr. 7. pr. § 1-4. D. 2. 14.

⁹ fr. 1. pr. fr. 7. § 4. D. 2. 14. See § 459, *infra*, note 3.

¹⁰ As also already according to the canon law: cap. 1. 3. X. 1. 35.

¹¹ *Langsdorf*, Tract. de pactis et contractibus Romanorum, Mannheim, 1772; *Weber*, Von der natürl. Verbindlichkeit, § 83-85; *Griesinger*, Von der Verbindlichkeit der Verträge, Tübingen, 1793; *Unterholzner*, Schuldverh. Vol. 1, p. 25, *seq.*; *Savigny*, Obligation. R. Vol. 2, § 72-78.

2. *Review of the Actionable Conventions according to the Roman Law.*

§ 396. The Roman law generally requires for the production of a valid obligation from a convention a certain external form. This form consists in certain words uttered orally (*verbis contrahitur obligatio*). But to this rule there were the following ancient exceptions:

1. In cases in which a certain written form could take the place of the verbal form (*literis contrahitur obligatio*).

2. There were certain conventions freed from all form, which include—

a. The obligations contracted by simple consent (*obligationes, quæ solo consensu contrahuntur*)—in which it was held that the simple agreement of the parties was sufficient to produce an obligation and action.

b. The obligations contracted by the subject matter (*obligationes, quæ re contrahuntur*). The subject matter is substituted for the verbal form when one party has already given something to the other party, which the other must subsequently return in specie, or in an equal quantity and quality.¹ These formless contracts were, with the exception of the loan, *contractus bonæ fidei*, while the formal contracts were always *stricti juris*.²

3. The number of the formless contracts was considerably increased by the introduction of the *præscriptis verbis* action (§ 207, *supra*). The new contracts which this *bonæ fidei* action produced resembled the cases of contract by the subject matter (*re contrahitur obligatio*), as the new action could only be instituted when the plaintiff had given something to or done something for the defendant, which, according to the agreement, had to be returned, or something else done in return. These were usually termed innominate contracts.³

4. In the course of time certain pacts were recognized as being actionable as an exception (§ 395, *supra*), which included—

a. The pacts *contractui bonæ fidei adjecta* (§§ 460, 461, *infra*).

b. The prætorian pacts.

c. The pacts *legitima* (§ 462, *seq.*, *infra*).

5. In the modern Roman law the obligations in writing (*literarum obligatio*) wholly ceased.⁴

TITLE FIRST.

OF CONTRACTS.

KINDS OF CONTRACTS.

§ 397. According to the grounds of their actionability, the Roman law divides contracts into four kinds, viz.: obligations by virtue of their subject matter; by words solemnly uttered; by writing; and by the simple agreement

¹ § 2. I. 3. 13. (14). See fr. 52. D. 44. 7; Gaius, III. §§ 89. 90.

² On the difference between *obligationes et actiones stricti juris et bonæ fidei*, see *supra*, § 210.

³ See thereon § 442, *seq.*, *infra*.

⁴ See § 456, *seq.*, *infra*.

of the parties (*obligationum, aut enim re contrahuntur, aut verbis, aut literis, aut consensu*).¹ This distinction in the Roman law sources relates only to the nominate contracts, but at the present day it usually refers to all contracts, because to the idea of obligations by virtue of their subject matter such an extent is given that it also embraces innominate contracts.

I. Obligations Contracted by Simple Agreement (*obligationes, quæ consensu contrahuntur*).

IDEA AND KINDS.

§ 398. To the conventions which, for the founding of an obligation and action, require naught more than the simple agreement of the parties (*obligatio consensu contrahitur*) belong the contracts of sale, hiring and letting, the emphyteutical contract, and the partnership and mandate conventions.² The moderns term these consensual contracts.

I. CONTRACT OF SALE.

A. IDEA.

§ 399. The contract of sale (*emptio et venditio*) is that kind of contract whereby one, in consideration of a sum of money to be paid by another, promises to transfer or cede to him a thing. The former is termed the vendor, the latter the vendee.³

B. THE OBJECT OF SALE.

§ 400. The thing which is sold and the price stipulated for it are the objects of the contract of sale. The thing must be in commerce.⁴ Subject to this condition may be sold—

1. Corporeal as well as incorporeal things, and of the latter, real rights⁵ as well as claims.⁶
2. Single things as well as totalities.⁷
3. Present as well as future things. If the latter be of the kind that their

¹ Gaius, III. § 89; § 2. I. 3. 13. (14); fr. 52. D. 44. 7.

² Gaius, III. § 135-137; Inst. III. 22. (23); *Donellus*, Comm. jur. civ. Lib. 12. c. 10.

³ Gaius, III. 139. 141; Paul, II. 17; Inst. 3. 23. (24); Dig. 18. 1. 6; 19. 1; Cod. Theod. III. 1; Cod. Just. 4. 38. 40. 44-54; *Fragm. Vaticana*, tit. ex emto et vendito; *Donellus*, Comm. jur. civ. Lib. 13, c. 1-5; *Glück*, Comm. Vols. 16 and 17, § 972-989; *Sellers*, Spec. de contrahenda emtione venditione, Brussels, 1826; *Unterholzner*, Schuldverb. Vol. 2, p. 217, seq.; *Koch*, Recht der Forder. Vol. 3, p. 602, seq.; *Mohlor*, Les obligations, Vol. 2, p. 1, seq.

⁴ fr. 34. § 1. D. 18. 1. There are exceptions in § 5. I. 3. 23. (24), fr. 4. 5. 70. D. 18. 1. The sale of a thing not belonging to the vendor founds at least an obligational relation between the parties to the sale: fr. 28. D. 18. 1. See *infra*, § 403. fr. 34 § 3. D. 18. 1. has an exceptional case.

⁵ E. g., servitudes: fr. 80. § 1. D. 18. 1.

⁶ Dig. 18. 4; Cod. 4. 39. See *supra*, § 364; *Puchta*, *supra*, § 151.

⁷ E. g., an inheritance: Dig. 18. 4; Cod. 4. 39; *Bucher*, Recht der Ford. § 68; *Glück*, Comm. Vol. 16, §. 1013-1024.

profit depends either on chance, such as a cast of a net, or things otherwise uncertain, such as future products, then it depends on the terms of the contract whether the parties agreed that the purchase price shall be governed by the amount of the gain acquired or shall be absolutely paid. In the former it is the purchase of the hope of an uncertain profit (*emptio rei speratæ*); in the latter it is the purchase of a thing hoped for (*emptio spei*). In the latter both parties must absolutely submit to the result.¹

4. The purchase price must consist in an absolute or relatively designated sum of ready money (*certum*),² and the transaction must be really a sale (*verum*).³ It is not generally necessary for the validity of the convention⁴ that it be measured according to the true value of the thing (*justum*).

C. WHEN THE SALE IS PERFECTED.

§ 401. The contract of sale is perfect and the reciprocal obligations arising from it are complete as soon as both parties agree respecting the thing and its price. In this, as in all other consensual contracts, no writing is required⁵ to perfect them, excepting it be agreed to state them in writing, then it is first perfected by the signatures of the parties;⁶ and when things that generally are tasted before sale (*ad gustum*), then the contract is first perfected when the vendee has tasted them and found them acceptable.⁷

D. EFFECT OF THE SALE.

1. In Relation to the Risk and the Ownership of the Thing Sold.

§ 402. 1. As soon as the contract of sale has become perfect, the risk of the thing sold (*periculum rei*) and also all advantages of it (*commodum rei*), whether they be inherent or arise extrinsically, if not otherwise agreed on, pass to the purchaser.⁸ This rule, however, has the following exceptions:⁹

a. When fungible things have been sold according to measure, number or weight, then the risk does not pass to the purchaser till the things have been

¹ fr. 8. § 1. fr. 39. § 1. fr. 78. § 3. D. 18. 1; fr. 11. § 18. in fin. fr. 12. D. 19. 1; Glück, Comm. Vol. 4, p. 194, Vol. 16, p. 32.

² §§ 1. 2. I. 3. 23. (24); fr. 1. pr. D. 19. 4; fr. 7. § 1. D. 18. 1.

³ fr. 36. D. 18. 1; Const. 8. C. 4. 38; fr. 46. D. 19. 2; fr. 66. D. 23. 3.

⁴ fr. 16. § 4. D. 4. 4; fr. 22. § 3. D. 19. 2. See Jopke, Diss. de pretio in emtione, Utrecht, 1828.

⁵ fr. 38. D. 44. 7; Grousse, Diss. de contrahenda emtione et venditione ex jure Romano, Lovan. 1824.

⁶ pr. I. 3. 23. (24); fr. 1. § 2. D. 18. 1; fr. 2. D. 44. 7; Const. 4. O. 4. 48. See Const. 17. C. 4. 21.

⁷ fr. 34. § 5. D. 18. 1. fr. 4. pr. § 1. D. 18. 6; Glück, Comm. Vol. 16, § 981; Vol. 17, § 1036; Gensler, Pr. de emtione venditione, Jena, 1814, translated in Barth's Dissertationensamml. Vol. 1, p. 157, seq.

⁸ § 3. I. 3. 23. (24); Dig. 18. 6; Cod. 4. 48; Hein, de periculo et commodo rei venditæ et traditæ sec. jus. Rom., Leyden, 1824; Glück, Comm. Vol. 17, § 1033-38.

⁹ In these exceptional cases the sale does not become perfect immediately, in the narrow sense of this word.

measured, counted or weighed to him.¹ If, on the contrary, fungible things have been sold in mass and gross (*per aversionem*), then the risk passes to the purchaser from the moment the bargain is concluded.²

b. If the contract of sale be conditional, then the risk passes to the purchaser on the performance of the condition. If the thing pending the condition be destroyed by casualty, then the loss is the vendor's. If it be only deteriorated, then the vendee must bear it if the condition be afterwards performed.³ This is also the rule when by the contract of sale it has been agreed that a third person shall designate the purchase price, as this is regarded as a condition.⁴

c. When several things are alternately sold, then the risk of them remains in the vendor till the election has been made by him; if before the election they be all destroyed, then the casual loss of the last of them is the vendee's.⁵

2 The property in the thing sold is not acquired by the vendee till its delivery and after payment of the purchase price; unless the sale was on credit, when the property passes at the same time with its delivery.⁶

2. Of the Obligations of the Contracting Parties in particular.

a. The Vendor.

§ 403. In relation to the obligation which is founded by the contract of sale. The vendor is bound—

1. To deliver the thing sold to the vendee at the proper time⁷ and place, with all its accessories and with all the products gathered since the conclusion of the convention.⁸

2. He is bound for every *culpa*, and is also especially bound for the custody of the thing.⁹

¹ This is also the rule when the object is fully designated and bounded: *e. g.*, the entire herd; all the wine contained in this cask; this entire heap of grain. This view is contested. But see *Glück, supra*, Vol. 17, p. 174, *seq.*

² fr. 35. § 5-7. fr. 82. § 2. D. 18. 1; fr. 4. §§ 1. 2. fr. 10. § 1. D. 18. 6; Const. 2. C. 4. 48. See § 401, *supra*, note 7.

³ fr. 8. pr. D. 18. 6; fr. 7. pr. D. 18. 1.

⁴ § 1. l. 3. 23. (24); Const. 15. C. 4. 38. See Gaius, III. § 140.

⁵ fr. 31. § 6. D. 18. 1; fr. 95. pr. D. 46. 3. See *infra*, § 538.

⁶ § 41. l. 2. 1; fr. 11. § 2. D. 19. 1; fr. 19. 53. D. 18. 1; fr. 5. § 18. D. 14. 4.

⁷ If he be sued before the purchase-money is paid, then, if naught else has been agreed on, he has the *exceptio nondum adimpleti contractus*: fr. 13. § 8. fr. 50. D. 19. 1. This applies also to the vendee when he is sued for the payment of the purchase-money before the delivery of the thing: fr. 25. eod. Respecting the damages the vendor must pay when he delays the delivery of the thing, see fr. 21. § 3. fr. 1. pr. fr. 12. D. 19. 1.

⁸ § 3 in fin. l. 3. 23. (24); fr. 7. pr. D. 19. 6; fr. 11. § 13. fr. 13. §§ 10. 13. 18. D. 19. 1.

⁹ This is expressed in fr. 5. § 2. D. 13. 6; fr. 31. §§ 11. 12. D. 21. 1; fr. 13. § 16. D. 19. 1; fr. 14. pr. D. 47. 2; fr. 36. D. 19. 1; fr. 3. D. 18. 6. But doubts are created by fr. 55. § 4. D. 18. 1; fr. 14. § 1. D. 18. 6; § 3. l. 23. (24) and Theophil. ad. h. l. See *Hase, von der Culpa*, pp. 386 and 513.

3. He is bound without special agreement, by a prescript of the Ædilian Edict,¹ for the hidden faults and defects of the thing (*morbi, vitia*) affecting it at the time of the contract;² and even if they were unknown to him,³ he is also bound for all characteristics of the thing which it according to express agreement should have or from which it should be free (*dicta et promissa*).⁴ If the thing sold be affected with hidden faults, or if the qualities promised be not found in it, then the vendee has the election, without distinguishing whether it be a great or trifling fault, whether he will sue for the entire dissolution of the contract or for a reduction of the price.⁵ In the former case he has the action *redhibitoria*, in the latter the action *quantum minoris*.⁶ The former endures six months, the latter one year.⁷

4. In case a third person by suit evict the vendee of the thing sold to him, the vendor is bound to indemnify him for it (*evictionem præstare*),⁸ even if he had not expressly promised this and had not known that the thing was another's.⁹ The vendor is bound to indemnify, excepting in the event of

¹ Dig. 21. 1; Cod. 4. 58. The Ædilian Edict was originally applicable only to the sale of slaves and beasts of burden, but it was soon applied not only to the sale of all other things, but also to exchange: fr. 1. pr. fr. 19. § 5. fr. 38. pr. § 5. fr. 49. fr. 63. D. 21. 1; Const. 4. C. 4. 58. Cicero de off. III. c. 16. 17. already shows this double extension. On the contrary, it is not applicable to gifts and hiring and letting. See *Münter*, Rosztäuscherrecht, 2d ed., Hanover, 1796; and also see *Koch*, Recht der Forder. Vol. 2, p. 422, seq.; *Unterholzner*, Schuldverh. Vol. 2, p. 264, seq., on several cognate matters.

² fr. 54. D. 21. 1; Const. 3. C. 4. 58.

³ If he knew and was silent, then he could always be sued in the action on the contract (§ 405, *infra*) for all damages: Const. C. 4. 58. This action is now according to modern law also permitted against the ignorant vendor, but only for the same object as the Ædilian action *quantum minoris*: fr. 13. pr. § 1. D. 19. 1.

⁴ fr. 18. fr. 19. pr. § 2. fr. 38. § 10. D. 21. 1; fr. 66. pr. D. 18. 1.

⁵ fr. 1. § 6. 8. fr. 18. pr. fr. 19. § 1. D. 21. 1; fr. 25. § 1. D. 44. 2.

⁶ In the case of slaves and cattle the vendee can demand a double stipulation for the specified deficiency, and for its refusal can institute one or both of these actions: fr. 11. § 4. D. 19. 1; fr. 28. D. 21. 1; Const. 14. C. 4. 49. See also fr. 31. § 20. D. 21. 1. And if the ornaments on the animal at the time of sale were not delivered, he can institute an Ædilian action either for the return of the animal or for the delivery of the ornaments: fr. 38. pr. § 11. D. 21. 1.

⁷ fr. 19. § 6. fr. 38. pr. fr. 55. D. 21. 1; Const. 2. C. 4. 58. Respecting the refusal of security, the action *redhibitoria* can be instituted only in two months and the action *quantum minoris* only in six months. Respecting the refusal to deliver the ornaments, in general an action can be instituted only in two months: fr. 28. 38. pr. D. 21. 1. On the use of Ædilian actions among merchants, see *Lüderssen*, Diss. num mercator venditis mercibus actione quanti minoris, Helmstadt, 1801; *Pöhl*, Handelsrecht, Vol. 1, p. 180.

⁸ Dig. 21. 2; Cod. 8. 45; *Koch*, Recht der Ford. Vol. 2, p. 363, seq.; *Glück*, Comm. Vol. 20, § 1115, seq.; *J. B. Müller*, Versuch über die Gewährleistung, Jena and Leipzig, 1805; *K. O. Müller*, Die Lehre des Röm. Rechts von der Eviction, Halle, 1851.

⁹ fr. 19. D. 21. 2; Const. 6. 25. C. 8. 45; Const. 5. C. 4. 52. The action in this

fraud, only when the vendee has been deprived of the thing rightfully by the judgment of the ordinary judge,¹ and the vendee did not neglect to defend it. Hence when the vendee has been sued or should sue respecting the thing, he must give notice thereof to the vendor and demand aid from him in the action instituted (*litem denunciare*).²

The obligation of the vendor to guarantee the thing transferred arises generally, not only in sale, but also in all onerous conventions; hence in exchange (§ 445, *infra*), in partition of an inheritance (§ 750, *infra*), in composition (§ 448, *infra*), and when property is given in payment, etc. (§ 532, *infra*), but not in gift (§ 468, *infra*).

b. Obligations of the Vendee.

§ 404. The vendee is bound—

1. To pay the promised purchase price immediately on the delivery of the thing sold. If this be not done, then he must pay interest, even if he be not in delay.³

2. The vendee is also answerable for every wrong,⁴ and is bound to give the vendor security for the purchase money.⁵

3. The vendee must repay the money which the vendor has expended since the conclusion of the contract for the preservation of the thing sold.⁶

3. Actions on Contracts of Sale.

§ 405. Contracts of sale give the vendor the action *venditi*, the vendee the action *empti*. Both of them are direct actions, adapted for the enforcement of the obligations arising from contracts of sale rightfully or in pursuance of special agreements (*ex pactis adjectis*, §§ 452, 453, *infra*).⁷

case may be instituted on the sale (§ 405, *infra*) for the vendee's damages. See, in addition to the passages cited, fr. 66. § 3. fr. 70. D. 21. 2; fr. 45. pr. D. 19. 1. With the Romans in the case of eviction the double stipulation was very usual, and when it was given if the whole thing were evicted the *duplum* could always be demanded in the action *ex stipulatu*: fr. 42. 43. 56. § 2 D. 21. 2. Respecting partial eviction, see fr. 1 fr. 64. D. 21. 2.

¹ fr. 34. 35. D. 21. 2. But not if it be destroyed by casualty or the vendee be deprived of it by the peremptory decree of the regent: fr. 11. pr. fr. 21. D. 21. 2; Const. 17. C. 4. 49.

² fr. 34. pr. fr. 51. § 1. fr. 53. § 1. fr. 55. § 1. fr. 56. § 4-7. fr. 63. § 2. D. 21. 2; Const. 8. 9. 20. 24. C. 8. 45.

³ See *supra*, § 381, notes 3 and 4.

⁴ See the passages and writings cited in § 403, *supra*, note 2, p. 317.

⁵ fr. 11. § 2. D. 19. 1.

⁶ Const. 16. C. 4. 49; fr. 13. § 22. D. 19. 1.

⁷ § 1. I. 3. 23. (24); fr. 11. pr. fr. 13. § 19. D. 19. 1; Cod. 4. 49; Glück, Comm. Vol. 17, § 1040-1043.

E. RESCISSION OF THE CONTRACT OF SALE.

§ 406. The contract of sale may be rescinded—

1. By the agreement of the parties (*mutuo dissensu*), if it has not been fulfilled.¹

2. At the request of one of the parties—

a. If he had reserved the right for a certain time to withdraw from the contract,² and

b. If one or the other of the parties has been injured by the contract more than one-half of the purchase price³ (*lesio ultra dimidium s. enormis*), which occurs when that which he received is not worth half as much as he gave for it. In this case the injured party can sue for the rescission of the contract, but the defendant has the election whether he will suffer the rescission or whether he will avoid it by compensating for the injury.⁴ Such damages are not paid if they have been expressly or impliedly renounced,⁵ or if a testator commanded a thing to be sold at a certain price,⁶ and in the sale of a hope, such as the product of the next cast of a net (*emptio spei*).⁷

II. THE CONTRACT OF LETTING OR RENTING.

A. IDEA.

§ 407. The contract of letting or renting (*locatio et conductio*)⁸ is that whereby one, in consideration of the payment of rent or reward (*merces*)⁹ by another, allows to him the employment and the use of a thing, or promises

¹ § 4. I. 3. 29. (30). See fr. 6. § 2. D. 18. 1; fr. 3. fr. 5. § 1. D. 18. 5; fr. 35. D. 50. 17; Cod. 4. 45.

² fr. 3. D. 18. 1; Const. 4. C. 4. 58; Dig. 18. 5.

³ If he were forced or defrauded by the other party, then the damages need not be so great. On these cases see *supra*, §§ 226, 227, 388, 389.

⁴ Const. 2. C. 4. 44. compare with Const. 8. C. 4. 44. These rescripts speak only of the vendor; but the practice has not only extended them to the vendee, but to all onerous conventions; *Wickers*, Diss. de remedio L. 2. C. de rescind. emt. vend., Groningen, 1805; *De Bouwier*, Diss. de rescindenda venditione ob lationem enormem, Utrecht, 1824; *Dedekind*, de vera indole et vi lationis, Göttingen, 1837; *Glück*, Comm. Vol. 17, § 1028–1032; *Unterholzner*, Schuldverh. Vol. 2, p. 245, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 590, *seq.*, p. 645, *seq.*

⁵ arg. fr. 38. D. 18. 1.

⁶ fr. 49. § 9. D. 30.

⁷ fr. 8. § 1. D. 18. 1. Many think that a public sale should be excepted, but for insufficient reasons: *Glück*, Vol. 17, p. 93–97; *Unterholzner*, *supra*, p. 248.

⁸ Gaius, III. § 142; Inst. 3. 24. (25); Dig. 19. 2; Cod. 4. 65; *Westphal*, Lehre vom Kauf-Pacht-Mieth-und Erbenzinscontracte, Leipzig, 1789; *Aniechold*, De contractu locationis et conductionis, Leyden, 1815; *Henot*, De tit. Pand. locati conducti, Lovan. 1820; *Donellus*, comm. jur. civ. Lib. 13, c. 6–9; *Glück*, Comm. Vol. 17, § 1044–1060, Vol. 18, § 1061–1064; *Unterholzner*, Schuldverh. Vol. 2, p. 316, *seq.*; *Koch*, Recht der Forder. Vol. 3, p. 329, *seq.*

⁹ The rent or reward is here just as necessary as the price in the contract of sale: fr. 20. § 1. fr. 46. D. 19. 2.

to perform certain services. This contract is perfect and the obligation arising from it is complete as soon as the contracting parties have agreed respecting the object and the rent or reward,¹ unless it was agreed to put the contract in writing.²

B. KINDS OF CONTRACTS OF LETTING AND RENTING OR HIRING.

§ 408. The contract of letting and renting or hiring, in relation to its object, is divided into the following kinds:

A. The letting and renting of things (*locatio et conductio rerum*). These things may be—

1. Movables, urban houses or land. In such case it is termed a contract of renting, and in the case of dwellings and houses the lessee is termed *inquilinus*.

2. Or they may be rural land or houses, etc.; then it is a contract of letting, and the lessee or tenant is termed *colonus*.

B. The letting and hiring of services, which are of two kinds—

1. Either such services as a servant or workman promises to perform in consideration of a certain reward (*locatio et conductio operarum*);

2. Or when one authorizes another to conduct a certain work, to which the other promises the performance of the requisite services in consideration of a certain reward. This is a contract of hiring or bargaining (*locatio et conductio s. redemptio operis*). In the letting and renting of things (*locatio et conductio rerum*), he who permits their use and enjoyment, and in the letting and hiring of services (*locatio et conductio operarum*), he who is to perform them, is termed *locator*, while, on the contrary, he who is to pay for these is termed *conductor*. In the letting or hiring of services, the hirer or engager is termed *locator operis*; the hired or engagee is termed *conductor s. redemptor operis* (§ 414, *infra*).

1. Of the Letting and Renting of Things (*locatio et conductio rerum*).

a. Object.

§ 409. There are two matters to be observed in the renting of things; one is the thing which is the object, the other the rent or reward which is paid for the use and enjoyment of the thing.

1. Every thing movable or immovable, corporeal or incorporeal,³ may be let or rented, but it must not be such as is consumed by use.⁴ The things

¹ pr. l. 3. 24. (23); fr. 1. D. 19. 2; fr. 2. D. 44. 7.

² arg. pr. l. 3. 23. (24); Const. 17. C. 4. 21.

³ *E. g.*, fr. 1. § 1. fr. 9. § 3. D. 39. 4. However, prædial servitudes cannot be let without the land to which they appertain: fr. 44. D. 19. 2. In the sources the letting of the usufruct is rarely spoken of: fr. 66. D. 23. 3; § 1. in fin. l. 2. 5; hence the letting of its object is more frequently spoken of: fr. 12. § 2. D. 7. 1; fr. 9. § 1. § 25. § 1. D. 19. 2.

⁴ Such a one at least cannot be let for ordinary use. See fr. 3. § 6. D. 13. 6.

belonging to another may be rented.¹ The lessee may sublet the things rented to him, if not otherwise agreed on (*sub locatio et sub conductio*).²

2. The rent or reward must have the same characteristics as the price in the contract of sale (§ 400, *supra*). It must consist in a certain sum of money,³ yet in the letting of a thing that produces, a part of the product may be stipulated for rent; and when this is an aliquot part of the product it is termed *colonus partiarius*.⁴

b. *Obligations of the Contracting Parties.*

A. *Of the Locator (lessor).*

§ 410. In relation to the mutual obligations of the parties arising from letting and renting of things, both parties from the moment of the perfection of the contract are answerable for every wrong (*culpa*), for *diligentia* and *custodia*, but purely casual damages need not be compensated.⁵

1. The *locator* (bailor) is bound to deliver the thing to the *conductor* (bailee) for the designated use throughout the whole of the rent term, unless he can prove that he is placed in the necessity of using a rented house for himself or his family; or when the house requires necessary repair; or when the *conductor* (bailee) uses the hired thing badly; or if he has not paid the rent for two years.⁷

2. The *locator* (bailor) must protect the *conductor* (bailee) in the use and service of the thing,⁸ and during the rent term must keep it in such condition that the *conductor* (bailee) is able to make the intended use of it.⁹

3. If not otherwise agreed on, the *locator* (bailor) must bear the incumbrances of public burdens and taxes on the thing;¹⁰ and

¹ fr. 12. § 2. D. 7. 1; fr. 23. pr. D. 20. 1; fr. 7. 9. pr. § 6. fr. 35. § 1. D. 19. 2. One cannot generally hire his own, fr. 45. pr. D. 50. 17; fr. 15. D. 16. 3; Const. 20. 23. C. 4. 65, but may exceptionally when the lessor has a right to its use: fr. 29. pr. D. 7. 4; fr. 35. § 1. fr. 37. D. 13. 7; fr. 28. 37. D. 41. 2.

² Const. 6. C. 4. 65.

³ pr. I. 3. 24. (25); fr. 2. pr. fr. 25. pr. D. 19. 2.

⁴ fr. 25. § 6. fr. 35. § 1. D. 19. 2; Const. 18. 21. C. 4. 65; Const. 8. C. 2. 3; Glück, Vol. 17, p. 331, *seq.*

⁵ Const. 1. 28. C. 4. 65. See § 5. I. 3. 24. (25); fr. 25. § 7. D. 19. 2; fr. 5. § 15. in fin. D. 13. 6; fr. 9. § 2. D. 19. 2; Hasse, von der Culpa, 2d ed. p. 373. If the lessee of a farm is left the cattle which belong to it at a designated rate, on condition that after the ending of the term he shall leave a cattle herd on the farm of the same value (*contractus sociatæ*), then the lessee becomes the owner of the cattle and also bears the casual damages: fr. 3. fr. 54. § 2. D. 19. 2; Bertram, Diss. de contractu sociatæ, Halle, 1774.

⁶ Const. 3. C. 4. 65. This constitution speaks only of rented houses and does not apply to rented ground.

⁷ fr. 54. § 1. fr. 56. D. 19. 2.

⁸ fr. 9. pr. § 1. fr. 30. pr. D. 19. 2.

⁹ fr. 15. § 1. fr. 58. § 2. fr. 25. § 2. D. 19. 2. But see fr. 25. § 4. D. 19. 2.

¹⁰ Quartering of soldiers or guests of the city according to the Roman law is a real burden: fr. 3. §§ 13. 14. fr. 14. § 2. D. 50. 4; fr. 11. D. 50. 5; Const. 5. 9. C.

4. Reimburse the *conductor* (bailee) for the money beneficially expended by him on the thing.¹

B. *Of the Conductor* (lessee).

§ 411. The *conductor* (lessee) has the right to use the thing and reap its products: the property in the latter he first acquires by their perception.² On the other hand—

1. He is bound to pay the stipulated rent at the appointed time. If a considerable part of the products before perception be destroyed by pure casualty, then, if not otherwise agreed on, he can claim a proportional abatement of the rent. After the perception of the fruits they remain wholly at his risk.³

2. He cannot abandon the rented thing before the expiration of the term,⁴ unless circumstances arose which no longer permitted the peaceful use of it.⁵

3. After the term has ended he must return the thing to the lessor.⁶

C. *End of the Letting and Hiring of Things* (locatio et conductio rerum).

§ 412. The contract for rent ceases—

1. With the efflux of the time agreed on. If the same be immediately expressly or tacitly renewed, then it is termed *relocatio* (reletting). It is tacitly renewed when the lessee, after the end of the term, with the knowledge and without objection of the lessor, continues to use the rented thing. The new renting is governed by the former conditions, and if not otherwise agreed on or determined by the custom of the place, then the tacit reletting of rustic land continues always one year, and, as to urban land, till one party notifies the other. If the former convention in writing were for a certain time, then the tacit renewal will be for the same time.⁷

2. When the lessor has only a temporary right to the thing, which was known to the lessee on entering into the contract, he has no redress for indemnity against the lessor⁸ because of the cessation of the right.

12. 41. From which it is usually deduced that it is to be borne by the lessor. The burden of maintenance and board, often combined with the quartering burden, is at all events to be regarded as a personal burden, and therefore affects the lessee: *Glück*, Comm. Vol. 17, § 1053; *Unterholzner*, p. 366, note c; *Koch*, p. 742, *seq.*; *Vangerow*, § 641, Rem. 2.

¹ fr. 55. § 1. D. 19. 2.

² § 36. I. 2. 1. See *supra*, § 293.

³ fr. 25. § 6. D. 19. 2; fr. 15. § 2-7. D. 19. 2. See also § 372, *supra*, note 8, and works cited in § 410, note 10, *supra*.

⁴ fr. 55. § 2. D. 19. 2.

⁵ fr. 25. § 2. fr. 27. § 1. fr. 28. fr. 13. § 7. fr. 33. D. 19. 2; *Glück*, Comm. Vol. 17, p. 478.

⁶ § 5 in fin. I. 3. 24. (25); fr. 48. § 1. D. 19. 2; Const. 10. C. 8. 4; Const. 34. C. 4. 65; Const. 25. C. 4. 65; *Glück*, Vol. 17, p. 497, *seq.*

⁷ fr. 13. § 11. fr. 14. D. 19. 2; *Glück*, Comm. Vol. 17, p. 278.

⁸ fr. 9. § 1. D. 19. 2; fr. 25. § 4. D. 24. 3.

3. When the lessor sells the thing, and on the sale the continuation of the letting is not agreed on with the vendee (sale breaks the letting), he is not bound by the contract concluded between the lessor and the lessee, but can evict the latter; but for this the latter can claim damages from his lessor. On the other hand, the lessee need not continue the contract with the vendee of the thing.¹ The contract for letting is not dissolved by the death of the one or the other party, provided the contrary be not expressly agreed on.²

2. *Letting and Hiring of Labor* (*operarum and operis locatio et conductio*).

a. *Object.*

§ 413. The services which, in the letting and hiring of labor, form the object of the contract must be lawful and such as have a market price, *i. e.*, for which one generally pays a compensation, and not as an *honorarium*.³ The compensation, which is also termed *manupretium*,⁴ is governed by the same principles as govern the letting and hiring of things.

b. *Obligations of the Contracting Parties.*

§ 414. Both parties are bound for every wrong, but not for casualty.⁵

1. If a casualty render the performance of the service wholly or partially impossible, then the promised compensation must be paid, unless it happened to the person of him who should perform the services.⁶

2. If casual damages happen in a contract of labor, then this affects the employer,⁷ excepting either when the employé has assumed it or the employer has given a certain quantity of fungible things to be used in a manufacture. This, in doubtful cases, is to be interpreted so that it shall not be necessary that the thing given be applied to the work, but only an equal quantity of things of the same kind;⁸ and hence the hiring in this case has a certain similarity to loan.⁹ The casual damages must not be confounded with those arising from neglect in the conducting of a work or from a fault which proceeds from the material used by the employé (*vitium operis*). These the employé must bear,¹⁰ unless they arise after the work has been approved by the employer.¹¹

¹ Const. 9. C. 4. 65. See fr. 25. § 1. fr. 32. D. 19. 2; fr. 120. § 2. D. 30; *Gesterding, Nachforschungen*, Vol. 3, p. 217, on the principle that sale breaks the letting.

² § 6. I. 3. 24. (25); fr. 19. § 8. D. 19. 2; Const. 10. C. 4. 65.

³ fr. 5. § 2. D. 19. 5.

⁴ fr. 30. § 3. D. 19. 2.

⁵ fr. 25. § 7. D. 19. 2. and the passages and writings cited in § 410, *supra*, note 5.

⁶ fr. 38. pr. D. 19. 2; fr. 19. § 9. fr. 15. § 6. D. 19. 2.

⁷ fr. 59. D. 19. 2.

⁸ If the employé furnish the entire material and the manufacture do not represent merely an accession to the material furnished by the employer, it is not an hiring and letting, but a purchase and sale: fr. 2. § 1. D. 19. 2; fr. 65. D. 18. 1.

⁹ fr. 31. D. 19. 2.

¹⁰ fr. 51. § 1. fr. 62. D. 19. 2.

¹¹ fr. 24. pr. D. 19. 2. Such is the case also when a work is to be done piece-

c. *End of the Letting and Hiring of Labor* (*operarum and operis locatio et conductio*).

§ 415. The contract for letting and hiring of labor is ended—

1. When a single service which was its object is performed.
2. When it is formed for a continuous service of the same kind, by the death of him who is to perform the service, and by the efflux of the time for which it was agreed. There may be an express as well as tacit rehiring, when the servant or workman performs his services after the ending of the time agreed on. The latter continues till one party notifies the other.¹
3. The contract for hiring ends when the labor is done or the work finished. In this case there also may be a rehiring.²

d. *Actions Arising from Letting and Hiring* (*locatio et conductio*).

§ 416. The contract of letting and hiring of either things or services gives to the lessor the action *locati*, and to the lessee the action *conducti*. They are both direct actions for the enforcement of the obligation resulting from the contract.³ The lessee of urban land (*inquilinus*), but not of rural land (*colonus*), when he has performed his contract, has the interdict *de migrando* against the lessor when he will not permit him to remove with his property (*invectis et illatis*).⁴

e. *Lex Rhodia de jactu*.⁵

§ 417. When a peril of the sea threatens to wreck a ship, and a part of the cargo is jettisoned to preserve the ship and the remainder of the cargo, or if in consequence of the peril the remainder of the cargo has been damaged, then the owners of the jettisoned or damaged cargo, by the *Lex Rhodia de jactu* which the Romans have adopted, have the right to claim from the owners of the preserved ship and cargo a proportional compensation for the loss suffered.⁶ Respecting which is to be observed—

1. That every one who must contribute for the damages is bound only for his share, and is not bound to pay for the deficiency of another.⁷

wise, or to be finished or delivered according to a standard, and the damages affect the part that has been already accepted: fr. 36. 37. D. 19. 2. However, the acceptance is not conclusive when it has been influenced by the fraud of the employé: fr. 24. in f. D. 19. 2.

¹ arg. fr. 13. § 11. in fin. D. 19. 2. The original contract endures till the like notice be given when no time is designated and he who should perform the service does not previously die.

² fr. 13. § 10. D. 19. 2.

³ pr. I. 3. 24. (25).

⁴ fr. 1. § 1-3. D. 43. 32.

⁵ Paul. II. 7: D. 14. 2; *Peckius*, ad rem nauticam pertinentes, with notes by *Vinnius*, p. 188-227; *Glück*, Comm. Vol. 14, § 383; *Spanoghe*, Diss. de lege Rhodia de jactu, Ghent, 1830; *Schryver*, sur la loi Rhodia de jactu, Brussels, 1844.

⁶ fr. 1. D. 14. 2. The same principle applies when the ship is rescued from another kind of peril by the sacrifice of a part of the cargo, e. g., ransom paid to pirates: fr. 2. § 3. fr. 4. pr. D. 14. 2.

⁷ fr. 2. § 6. D. 14. 2.

2. In estimating the proportional compensation for damages, the jettisoned cargo is valued at the cost price and the saved cargo at the price for which it would probably sell.¹

3. If the ship, notwithstanding the jettison, perish in the peril in which the jettison was made, then no compensation for damages is given; but if the ship survive that peril, but subsequently perish in another peril, then the compensation must be given.²

4. By the Roman law, however, if he who suffered damages from the jettison had made a contract of affreightment with the ship's owner or master, then he is remitted to his action on the contract against him, who thereupon can institute an action against the owners of the saved cargo on the contract made with them.³

III. EMPHYTEUTICAL CONTRACT.⁴

§ 418. The emphyteutical contract (*contractus emphyteuticarius*) is that whereby one transfers land to another as *emphyteusis*, in consideration that the latter shall pay to the former a return or rent for it (§ 326, *supra*). This contract is in some respects similar to the contract of sale, and in other respects similar to a contract for rent, hence the Roman jurists disputed whether it was the former or the latter. Zeno said it was a contract peculiar to itself, with which Justinian agrees.⁵ Like the contracts of sale and rent, it becomes complete by the simple agreement of the parties. Its effect is that the owner must transfer the land to the *emphyteuta*, thereupon the latter must pay the agreed rent. In case of misfortune the law prescribes that the total destruction shall be borne by the owner, the partial destruction by the *emphyteuta*.⁶ This rule may be varied by an agreement in writing.⁷ The action resulting from this contract which the parties have against each other is direct, and is now termed action *emphyteuticaria*.

IV. THE CONTRACT OF PARTNERSHIP.

A. IDEA.

§ 419. The contract of partnership (*societas*)⁸ is that whereby several

¹ fr. 2. § 4. D. 14. 2.

² fr. 4. § 1. D. 14. 2.

³ fr. 2. pr. D. 14. 2.

⁴ For the literature, see § 326, *supra*.

⁵ Const. 1. C. 4. 66; § 3. I. 3. 24. (25). The dispute related solely, or at least chiefly, to what influence the casualty affecting the emphyteutical land has on the obligation for the payment of the rent. According to Zeno's prescript it shall be determined according to circumstances: sometimes the rules governing rent and sometimes the rules governing the purchase price shall be applied.

⁶ § 3. I. 3. 24. (25.) in fin.; Const. 1. C. 4. 66. in fin.

⁷ Const. 1. C. 4. 66.

⁸ Gaius, III. § 148-154; Inst. 3. 25. (26); Dig. 17. 2; Cod. 4. 37; *Donellus*, comm. jur. civ. Lib. 13, c. 15-17; Lib. 16, c. 24; *Glück*, Comm. Vol. 15, § 961-971; *Unterholzner*, Schuldverh. Vol. 2, p. 378, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 519, *seq.*; *Molitor*, Les obligations, Vol. 2, p. 271, *seq.*

persons (*socii*) unite themselves to accomplish a lawful common object.¹ It is completed by the simple consent and agreement of all the partners.²

B. KINDS OF PARTNERSHIP.

§ 420. The partnership is *universal* (*societas totorum s. omnium s. universorum bonorum*) when all the property which the separate partners have or may acquire in the future shall be included in the partnership, and *particular* when only certain property is included.³ In the latter sometimes pieces of property are contributed to the partnership by the partners to whom they belong, or are contributed by them for the partnership use.⁴ The particular partnership relates frequently to acquisition by labor or services.⁵ Such partnership for acquisition (*societas quæsturia*) may be of very different magnitude and may relate especially to all acquisitions of a designated kind (*societas universorum quæ ex quæstu veniunt*).⁶ In a universal partnership all expenditures and debts of the several members are to be borne for the common account.⁷ On the contrary, in every other partnership only those which were caused by the common object (partnership debts), not also the private debts of the several members,⁸ are borne by the partnership.

C. THE LEGAL RELATIONS OF THE PARTNERS BETWEEN THEMSELVES.

§ 421. The legal relations of the partners between themselves, founded on the partnership contract, are as follows :

1. Every partner must give the contributions which he promised;⁹ these may be equal or unequal, and may consist in things, money or services.¹⁰ The services notwithstanding must be lawful, and he who renders them must do so as a member of the partnership and not as its servant.¹¹

2. The profit and loss must be divided among all of them. The part of

¹ fr. 57. D. 17. 2. See fr. 70. § ult. D. 46. 1.

² fr. 4. pr. D. 17. 2. On the difference between partnership and things in common, see fr. 31. D. 17. 2; *Hasse*, Beitrag der Theorie Gütergemeinschaft, p. 185.

³ pr. l. 3. 25. (26); fr. 1. § 1. D. 17. 2. In the universal partnership all the gains of its members are in common: fr. 3. § 1. D. 17. 2.

⁴ fr. 58. pr. D. 17. 2. On the question when the one or the other is to be taken, see fr. 58. cit. pr. § 1; fr. 52. § 2. D. 17. 2; fr. 13. § 1. D. 19. 5; *Glück*, Vol. 15, p. 397, seq.; *J. P. Mayer*, De divisione bonorum societatis, Landshut, 1825.

⁵ fr. 7-13. D. 17. 2.

⁶ *Treitschke*, Die Lehre von Erwerbsgesellschaft und von Commanditen, Leipzig, 1844.

⁷ fr. 39. § 3. D. 10. 2; arg. fr. 39. § 1. D. 50. 16.

⁸ fr. 12. 27. D. 17. 2.

⁹ fr. 52. § 8. fr. 73. D. 17. 2. He who contributes nothing and yet participates in the profit is in relation to the others not regarded as a partner, but as a donee: fr. 5. § 2. D. 17. 2.

¹⁰ fr. 5. § 1. fr. 71. pr. D. 17. 2; Const. 1. C. 4. 37.

¹¹ fr. 57. D. 17. 2; fr. 70. § ult. D. 46. 1.

each may be determined by agreement or by an impartial third person, otherwise each has an equal part in the profit and loss of the partnership.¹

3. If a partner have the management of the partnership property or a part of it, then he is bound for such diligence as he generally employs in his own business.² He is bound to give an account of his administration, and pay interest for the money of the partnership which he may have employed for his private advantage.³ But, on the other hand, he may claim proportional recompense from each partner for what he expended of his own property for the benefit of the partnership.⁴

4. The action for the enforcement of all these obligations which each partner can institute against the other, and which is always a direct action, is termed action *pro socio*.⁵ However, each partner has against the other the benefit of competence, *i. e.*, for that which he has become indebted to the other out of the partnership he can only be adjudged to the extent of his ability to pay (*in quantum facere potest*).⁶

D. THE LEGAL RELATIONS OF THE PARTNERS TO THIRD PERSONS.⁷

§ 422. The legal relations of the partners to third persons are—

1. When all the partners have themselves contracted with a third person, then in general each partner may institute an action arising from the transaction for his share only against the third person, unless he was authorized by the others at the same time, or there is an obligation *in solidum*.⁸ And each of the partners may in general be sued by a third person, as well during the partnership as after its dissolution, for his respective share only, if they were not bound *in solidum*.⁹

2. If, on the contrary, all the partners did not contract jointly with the third person, then it depends on—

¹ Gaius, III. §§ 149. 150; §§ 1. 2. 3. I. 3. 25. (26); fr. 6. fr. 29. pr. fr. 76–80. D. 17. 2; Glück, Comm. Vol. 15, p. 406, *seq.*; Unterholzner, Vol. 2, p. 383; A. Van Rhenen, Explicatio L. 29. D. pro socio, Leyden, 1824. The agreement by which one partner shall have all the profit, the other all the loss (*societas leonina*), cannot exist as a partnership, but as a gift: fr. 29. § 2. D. 17. 2.

² fr. 72. D. 17. 2; § ult. I. 3. 25. (26); Hasse, von der Culpa, § 69. The adjudgment of a partner in an action *pro socio* makes him infamous: fr. 1. fr. 6. § 6. D. 3. 2. If a partnership thing be destroyed by casualty, then the damages must be borne by all; if it be not in partnership, then only by him to whom it belongs: fr. 52. §§ 3. 4. fr. 58. pr. § 1. D. 17. 2.

³ fr. 67. § 1. D. 17. 2; fr. 1. § 1. D. 22. 1. Interest must be paid for the money which a partner must contribute to the partnership, when he delayed its payment and employed it for his own benefit: fr. 60. pr. D. 17. 2.

⁴ fr. 38. § 1. D. 17. 2. See fr. 67. § 2. D. 17. 2.

⁵ § 9. I. 3. 25. (26); fr. 31. D. 17. 2; § 28. I. 4. 6.

⁶ fr. 63. pr. D. 17. 2; fr. 16. D. 42. 1; Glück, Vol. 15, p. 428, *seq.*

⁷ Lauterbach, De sociorum obligatione, in his Disput. jurid. Vol. 3, No. 20; Glück, Vol. 15, p. 460.

⁸ arg. fr. 11. § 1. D. 45. 2; Const. 9. C. 4. 2.

⁹ fr. 44. § 2. D. 21. 1.

a. If the contract were entered into by the manager or factor of the partnership for them; in such case he alone must sue,¹ and the several partners can only sue when he has ceded this right to them, or if they otherwise cannot receive satisfaction from him they may sue in an action *utilis* for their proportional part.² On the other hand, the third person may sue the partners in the *exercitoria* or *institoria* action (§§ 512, 513, *infra*), and even *in solidum*.³

b. Or if the contract were concluded by only one of the partners, who was not the agent, then the contracting partner only is authorized to complain against the third person, and the remaining partners, in the absence of a voluntary cession to them, have naught but their remedy against their co-partners.⁴ On the other hand, the contracting partner is bound *in solidum* to the third person,⁵ and the other partners will not be bound to the third person other than when the partnership has received the benefit of the contract, and then each one only *pro rata*.⁶

E. DISSOLUTION OF THE PARTNERSHIP.

§ 423. The partnership ceases—

1. When all of its members have agreed to dissolve it.⁷

2. When one member retires from it, which he may do if he give timely notice thereof; but he cannot retire from the partnership for the purpose of acquiring for himself alone what otherwise would have been partnership profit.⁸

3. When a partner dies;⁹ in this, as in the previous cases, the partnership also ceases among the remaining members.¹⁰

4. When the time for which the partnership was formed has expired,¹¹ or the business for which it was formed has ended.¹²

5. When its object is destroyed.¹³

6. When the property of a partner is confiscated or placed in bankruptcy,

¹ fr. 38. § 17. fr. 126. § 2. D. 45. 1; fr. 1. § 18. D. 14. 1; fr. 1. D. 14. 3.

² fr. 1. in fin. fr. 2. D. 14. 3; fr. 5. D. 46. 5; fr. 13. § 2. D. 19. 1.

³ fr. 13. § 2. fr. 14. D. 14. 3; fr. 1. § 25. fr. 2. fr. 4. § 1. D. 14. 1.

⁴ fr. 67. § 1. fr. 74. D. 17. 2.

⁵ fr. 28. fr. 63. § 3. D. 17. 2; Const. 13. C. 4. 2.

⁶ fr. 82. D. 17. 2.

⁷ fr. 65. § 3. D. 17. 2.

⁸ § 4. I. 3. 25. (26); fr. 63. § 10. fr. 64. fr. 65. §§ 3. 6. D. 17. 2. An agreement not to retire is not binding: fr. 14. D. 17. 2. On the consequences of the untimely or fraudulent renunciation, § 4. I. 3. 25. (26); fr. 17. § 1. D. 17. 2. See *Roman*, über abgeschlossenen Gesellschafts-Verträge, Heilbronn, 1825; *Glück*, Vol. 15, p. 469, *seq.*

⁹ fr. 59. pr. fr. 58. § 2. D. 17. 2.

¹⁰ § 5. I. 3. 25. (26). If after the death of a partner the others remain in the partnership, or if the heirs of the deceased enter into it, then it is regarded as a new partnership: fr. 37. D. 17. 2.

¹¹ fr. 65. § 6. D. 17. 2.

¹² § 6. I. 3. 25. (26).

¹³ fr. 63. § 10. in fin. D. 17. 2.

unless such partner was not to contribute money, but only services.¹ The dissolution of the partnership does not affect the rights of third persons.²

V. THE MANDATUM (*mandate*).

A. IDEA.

§ 424. The *mandatum*³ is a contract whereby one authorizes another to conduct his business, which the other promises to do.⁴ The former is termed *mandator* (*mandans*),⁵ the latter,⁶ *mandatary* (*mandatarius*). Only lawful transactions can form the object of a *mandatum*.⁷ The mandatary's services are gratuitous, and the promise of a reward changes the contract into⁸ a hiring; to which there is an exception when the transaction undertaken appertains neither to the services which are to be hired nor to the labors which are generally the object of a business. In such cases,⁹ according to the Roman law, there may be an action for the *honorarium* promised.¹⁰

B. THE KINDS OF MANDATA.

§ 425. 1. In relation to the person for whose advantage it is—

a. The mandate is simple (*mandatum simplex*) when the transaction is undertaken for the benefit of the mandator, and it is a qualified mandate (*mandatum qualificatum*) when the transaction is for the benefit of a third person. He who requests such benefit for a third person is termed *mandator*.¹¹

b. When the mandatary has been appointed *procurator in rem suam*, *i. e.*, when some one commissions him to institute an action with the view of ceding it to him by this commission (§ 364, *supra*), the moderns term such a commission *mandatum in rem suam*, while they term every other *mandatum in*

¹ §§ 7. 8. I. 25. (26); fr. 65. § 1. D. 17. 2.

² fr. 27. 28. D. 17. 2.

³ Gaius, III. § 155; Inst. 3. 26. (27); Dig. 17. 1; Cod. 4. 35; *Donellus*, Comm. jur. civ. Lib. 13. c. 10–14. Lib. 16. c. 23; *Buchner*, Theorie des Vollmachtsvertrages, Landshut, 1809; *Glück*, Comm. Vol. 15, § 950–960; *Graustand*, Diss de mandato, Utrecht, 1829; *Bucher*, Recht der Forderung. § 75–79; *Unterholzner*, Vol. 2, p. 585, *seq.*; *Koch*, Vol. 3, p. 442, *seq.*; *Molitor*, Les obligations, Vol. 2, p. 375, *seq.*

⁴ On the difference between mandate, command and advice, see § 6. I. 3. 26. (27); fr. 6 § 5. fr. 12. § 12. D. 17. 1; fr. 47. pr. D. 50. 17; *Vangerow*, § 659.

⁵ See also note 11, *infra*.

⁶ On the Roman terminology, see Gaius, III. § 160; § 10. I. 3. 26. (27); fr. 27. § 3. D. 17. 1; fr. 1. pr. D. 3. 1.

⁷ § 7. I. 3. 26. (27); fr. 6. § 3. fr. 22. § 6. D. 17. 1.

⁸ § 13. I. 3. 26. (27); fr. 1. § 4. fr. 36. § 1. D. 17. 1; fr. 13. 22. D. 19. 5; Const. 15. C. 2. 13. It is different when an *honorarium* is given without a previous promise: fr. 6. pr. D. 17. 1.

⁹ *E. g.*, for representing in a court of justice.

¹⁰ At least the action *extraordinaria*: fr. 7. D. 17. 1; fr. 1. § 10–12. D. 50. 12; Const. 13. § 9. C. 3. 1; Const. 1. C. 4. 35.

¹¹ fr. 12. §§ 14. 15. fr. 32. fr. 28. D. 17. 1; fr. 13. fr. 41. § 1. D. 46. 1. Yet every *mandans* is so termed: fr. 22. § 11. D. 17. 1.

rem alienam. The *mandatum in rem suam* and in general cession should not be confounded with assignment,¹ whereby the assignee is authorized to obtain money or something else with the same effect as if the assignor had obtained it for himself and then had delivered it to the assignee.

2. In relation to its extent, the commission may relate either to all of the business of the mandator, or to a class of business, or to a single matter. In both of the former cases it is a general *mandatum*; in the latter, a special *mandatum*.²

3. In relation to the form, the commission is either express or tacit. The latter is the case when one knows that another has transacted his business and is silent thereon.³ If one ratify an act which another transacted for him without special authority or previous knowledge, then this is in relation to himself (but not in relation to the transactor of the business) as valid as if he had given him express authority for it.⁴

4. Brokers (*proxenete*) are a particular kind of mandataries who transact mercantile affairs. They generally receive a commission, which is termed *proxenetium*, and when both parties have availed themselves of their services, they are competent witnesses in relation to the business transacted by them; but if they served only one party, they can testify against, but not for, him.⁵

C. THE LEGAL RELATION OF THE CONTRACTING PARTIES AMONG THEMSELVES.

§ 426. *Mandatum* creates two-fold legal relations—one between the parties themselves and the other between them and third persons with whom the mandatary as such contracted. In relation to the parties among themselves—

1. The mandatary is obliged to execute the business undertaken by him in accordance with the authority delegated to him.⁶ He must give the mandator all that he acquired by the execution of the commission and render an account, and must pay interest for the money he received if he applied it to his own use or if he delayed the payment of it;⁷ and he is bound to answer for every wrong.⁸

¹ pr. § 1-6. I. 3. 26. (27); fr. 34. pr. D. 17. 1; *Günther*, De assignationibus, Spec. I. et II., Leipsic, 1829; *Mühlenbruch*, Cession der Forderungsrechte, § 18, p. 226, seq.; *Unper*, Die rechtl. Natur der Inhaberpapiere, p. 73, seq.

² fr. 1. § 1. fr. 58. 60. 63. D. 3. 3.

³ fr. 60. D. 50. 17; fr. 18. fr. 53. D. 17. 1.

⁴ fr. 60. D. 50. 17. See Const. 3. C. 3. 32; Const. 3. C. 8. 38; fr. 9. D. 3. 5.

⁵ D. 50. 11; *Schreck*, Diss. de proxenetis, Erfurt, 1766.

⁶ § 11. I. 3. 26. (27); fr. 27. § 2. fr. 5. pr. § 1. D. 17. 1; § 8. I. 3. 26. (27); fr. 3. § 2. fr. 4. fr. 5. pr. §§ 3. 4. fr. 36. § 3. fr. 41. 46. D. 17. 1. On the right of substitution by the mandatary: fr. 8. § 3. D. 17. 1; fr. 28. D. 3. 5.

⁷ fr. 10. §§ 3. 8. fr. 12. § 10. fr. 29. pr. D. 17. 1.

⁸ Const. 11. 13. 21. C. 4. 35; fr. 22. § 11. D. 17. 1; fr. 1. § 12. D. 16. 3; *Haus* von der Culpa, 2d ed. p. 359, seq.

2. On the other hand, the mandator is bound to reimburse the mandatary all the money, with interest, which he expended in the execution of the business, even when without his neglect he did not attain the expected result.¹ The mandator must release the mandatary from the obligations undertaken,² and he is likewise answerable to him for every wrong.³ But for the simple casual damages which the mandatary suffered in the execution of the business the mandator is not answerable.⁴ The action arising from the *mandatum* that the parties have against each other is termed *mandati* action. It is direct when the mandator sues the mandatary, and contrary when the latter sues the former for the enforcement of the contract.⁵

D. THE LEGAL RELATIONS OF THE MANDATOR TO THIRD PERSONS WITH WHOM THE MANDATARY HAS CONTRACTED.

§ 427. The claims against third persons which are acquired through the mandatary in general belong to him,⁶ and not to the mandator.⁷ But the latter may require the cession of them,⁸ and in many cases,⁹ especially when only in this way he can acquire his own,¹⁰ without cession sue the debtor in an action *utili*.¹¹ But the mandator is liable for the debts which the mandatary contracted with third persons.¹² The creditor can sometimes sue the mandator immediately according to circumstances, by the prætorian edict, in the *exercitoria* or *institoria* action; and sometimes sue him in the *quasi institoria* action established by judicial custom.¹³

¹ fr. 10. § 9. fr. 12. § 7-9. fr. 27. § 4. D. 17. 1. See fr. 7. D. 17. 1; Const. 17. C. 4. 35.

² fr. 45. § 1-5. D. 17. 1.

³ fr. 61. § 5. D. 47. 2.

⁴ fr. 26. §§ 6. 7. D. 17. 1.

⁵ § 28. I. 4. 6. *Wintgens*, Diss. de actione mandati directi, Leyden, 1807. In the former action the condemnation always has infamy as a consequence, fr. 1. fr. 6. § 6. D. 17. 1, and sometimes also in the latter: fr. 6. § 5. D. 17. 1.

⁶ The claim for a loan which the mandatary made in the name of the mandator, and for payment made by him on the mandator's account, belongs to the mandator and not to the mandatary, because it was contracted through a performance which is regarded as if proceeding from the mandator: fr. 2. § 4. fr. 9. § 8. D. 12. 1; fr. 126. § 2. D. 45. 1; fr. 6. 57. pr. D. 12. 6; Const. 4. C. 4. 2; *Mühlenbruch*, Cession, § 11. p. 118, *seq.*

⁷ Vat. Fragm. §§ 328. 332; fr. 67. 68. D. 3. 3; fr. 11. § 6. D. 13. 7; fr. 10. § 6. fr. 49. D. 17. 1; fr. 49. § 2. D. 41. 2; Const. 7. C. 4. 50.

⁸ fr. 8. §§ 5. 10. in f. fr. 43. fr. 45. pr. § 5. 59. pr. D. 17. 1; fr. 49. § 2. D. 41. 2; Const. 2. C. 4. 27.

⁹ fr. 26. D. 12. 1; fr. 27. 28. D. 3. 3; fr. 5. D. 46. 5.

¹⁰ fr. 1. in f. fr. 2. D. 14. 3; fr. 5. D. 46. 5.

¹¹ Many remark that the Roman law always permits a *utilis* action, particularly in fr. 13. § 25. D. 19. 1, but this is doubted. On the law of the present day see *supra*, note 4, p. 160.

¹² fr. 67. D. 3. 3; fr. 1. § 17. D. 14. 1; fr. 1. D. 14. 3.

¹³ See *infra*, Chap. 3, Tit. 3.

E. END OF THE MANDATUM.¹

§ 428. The *mandatum* ceases—

1. By the consent of both parties.²
2. By the death of the one or the other party.³
3. By a revocation of the mandator.⁴
4. By a renunciation of the mandatary.⁵ But in the former, as in the latter case, the notice must not be untimely.⁶

II. Obligations Contracted through the Subject-Matter (*obligationes, quæ re contrahuntur*).

IDEA AND KINDS.

§ 429. In many conventions the obligation and action are not founded by reciprocal assent, but without the formality of the obligation from words (*verborum obligatio*), they are founded through that which the one gives or does for the other, which the other must return or for which he must do something else. This is what the Romans term *obligationes, quæ re contrahuntur*.⁷ The moderns term these conventions *real contracts*. These contracts are of two kinds; some of them have a particular name (*proprium nomen*) and produce an action bearing the same name. This is now termed a nominate contract (*contractus nominati*), and always has for its object the return of the thing given. Others with the Romans have no particular names and produce only an action *præscriptis verbis* (certain words), which was introduced subsequent to the mentioned particular actions. This is now termed an innominate contract (*contractus innominati*), and it sometimes proceeds for the return of a thing that has been delivered, but mostly for a designated counter performance.⁸ The Romans use the expression *re contrahitur obligatur* only for what is now termed *contractus reales nominati*. This, as well as the innominate contracts, is often preceded by a preliminary convention (*pactum antecedens*), which rests on simple agreement and which with the Romans, as a naked pact, was not actionable.⁹

A. Of the Nominate Contracts (*contractus reales nominati*).

I. LOAN.

A. IDEA.

§ 430. The nominate real contracts include loan (*mutuum s. res creditæ*),¹⁰ which is when one delivers to another a sum of money or a quantity of other

¹ Glück, Comm. Vol. 15, p. 331, seq.

² § 4. I. 3. 29. (30).

³ § 10. I. 3. 26. (27); fr. 12. § 17. fr. 26. pr. fr. 27. § 3. fr. 57. 58. D. 17. 1; Const. 15. C. 4. 35.

⁴ § 9. I. 3. 29. (30); fr. 15. D. 17. 1.

⁵ § 11. I. 3. 29. (30); fr. 22. § 11. fr. 23-25. D. 17. 1.

⁶ Const. 13. § 9. Const. 14. § 1. C. 3. 1.

⁷ Inst. 3. 14. (15).

⁸ fr. 1-3. D. 19. 5.

⁹ fr. 7. § 4. D. 2. 14; fr. 34. pr. D. 17. 1. Undoubtedly an action may now be instituted on it (s. 395, *supra*).

¹⁰ Gaius, III. § 90; pr. Inst. 3. 14. (15); Dig. 13. 1; Cod. 4. 1; 4. 2; *Donellus*,

fungible things, with the view that the other shall acquire property therein, and shall return to him so much of the same things in quantity and quality (*rem in genere, s. in eadem quantitate et qualitate*).¹

B. EFFECT OF LOAN.

§ 431. For the perfection of this contract the transfer of its object is essentially requisite, but this also may be *brevi manu*,² or by a representative of the lender.³ The effect of a loan actually made consists—

1. That the receiver becomes owner of the thing lent.⁴ Hence only he can lend who is the owner of the money, or what otherwise forms the object of the contract,⁵ and has the free disposition of his property.⁶

2. The borrower is bound to return the loan at the designated time; but

Comm. jur. civ. Lib. 14, c. 1; *Glück*, Comm. Vols. 11 and 12, § 776–788; *Bucher*, Recht der Ford. §§ 92, 93; *Unterholzner*, Schuldverh. Vol. 2, p. 10, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 259, *seq.*; *Molitor*, Les obligations, Vol. 2, p. 453, *seq.* On the *credere, i. e.*, faith that one will fulfill an obligation, such as the return of a loan, see fr. 1. fr. 2. §§ 3. 5. D. 12. 1; *Heinbach*, Die Lehre von dem Creditum, Leipzig, 1849, p. 131, *seq.*

¹ pr. I. 3. 14. (15); fr. 2. 3. D. 12. 1; fr. 1. § 2. D. 44. 7. The once existing *nexum* was a contract in the shape of a formal loan. *Festus*, v. *nexum*; Cicero, de orat. III. 40; Gaius, III. § 173–175.

² fr. 9. § ult. D. 12. 1; fr. 34. pr. D. 17. 1. *Traditio brevi manu* is the mode of transferring to him who hitherto had the naked possession (detention) of a thing the juridical possession or the property in it without the necessity on his part of a new apprehension (*apprehensio*) of the possession. The deposit of money with one only gives the naked detention of it; but as the use of it was thereby permitted to him, a loan arose and he became owner of the money without a new apprehension of the same (before it was moved from its place), inasmuch as by the naked will he began to have the money as his (*animo*), to possess it juridically and as owner. See v. *Savigny*, d. Recht d. Besitzes, 6th ed. p. 275, *seq.*

³ See *supra*, § 427, note 6. Also when the representative, *e. g.*, the debtor of the loanor, gives his own things in the name of the loanor: fr. 2. § 4. fr. 9. § 8. D. 12. 1. See fr. 34. pr. D. 17. 1. Even when he without authority acts only as manager of the business (*negotiorum gestor*): fr. 9. § 8. D. 12. 1. Since Ulpian's time it extends to the case when the creditor agrees with one who otherwise owes him money or other fungible things that he shall retain the debt as a loan: fr. 15. D. 12. 1; fr. 34. pr. D. 17. 1. This is further extended by fr. 11. pr. D. 12. 1. See also fr. 34. D. 17. 1.

⁴ pr. I. 3. 14. (15). See fr. 2. § 2. fr. 13. fr. 41. D. 12. 1; Gaius, III. § 90; *Cujas*, Observ. XI. 37.

⁵ If the loanor were not the owner of the thing, then the borrower cannot be the owner if he be not such for another reason. But he became the owner when he received the thing in good faith and mixed it with his own: fr. 78. D. 46. 3. But the borrower is liable for it when without becoming the owner he acquires the same advantage as if he had so become, especially if he consumed the thing received in good faith: fr. 11. § 2. fr. 19. § 1. D. 12. 1. A different case is spoken of in fr. 32. D. 12. 1. See *Glück*, Comm. Vol. 12, p. 25, *seq.*, Vol. 13, p. 200.

⁶ § 2. I. 2. 8; fr. 19. § 1. fr. 12. D. 12. 1.

he need not return the same things which he received, but only an equal quantity and quality, hence he bears the risk of the thing received.¹

3. The loanor's action for the return of the loan is termed action *mutui* or *condictio certi ex mutuo*.² The borrower, however, must be able to bind himself for the loan.³

4. Interest is not of right in this contract, but must always be expressly agreed on. In such case the loan is termed *fœnus* or *pecunia fœnibus*.⁴

C. SENATUSCONSULTUM MACEDONIANUM.

§ 432. According to a particular prescript of the senatusconsultum Macedonian,⁵ he who lends money to a family child shall not have an effectual action for its repayment, even after the death of the parent;⁶ hence the child as well as the parent has the exception senatusconsultum Macedonian as a peremptory exception against an action for its recovery.⁷ However, the senatusconsultum permits the moral obligation (*obligatio naturalis*) for the repayment of such loan. If, therefore, the debt has already been repaid by the child or by the father or by a surety, then the payment cannot be redemanded with the *condictio in debiti*.⁸ There are also cases in which neither the child nor the father can invoke the exception senatusconsultum Macedonian. They are the following:

1. When the father assented to the loan, or if he, after the making of it, assented to it.⁹ It is regarded as a tacit assent of the father when he knows that his son is borrowing money and he does not object.¹⁰

¹ § 2, l. 13, 14, (15); fr. 1, § 4, D. 44, 7; fr. 42, D. 23, 3. On the question, How is it to be held on the repayment of a money loan in an altered standard of coinage? see Glück, Comm. Vol. 12, § 783; but especially Savigny, Obl.-Recht, Vol. 1, § 49, seq., § 42-45; Zeis, Diss. quid debito pecuniario contracto etc., Tübingen, 1814.

² pr. l. 3, 14, (15); fr. 9, pr. D. 12, 1; Const. 5, C. 7, 35; fr. 2, D. 26, 9; Const. 2, C. 5, 39.

³ pr. § 1, l. 1, 21; fr. 13, § 1, D. 12, 6.

⁴ fr. 24, D. 19, 5; Const. 3, C. 4, 32. Generally the promise of interest, to be actionable among the Romans, must be clothed in a stipulation: to which there are exceptions in fr. 59, D. 22, 1; fr. 5, § 1, fr. 7, D. 22, 2; Const. 12, C. 4, 32; Novel 106, cap. 4.

⁵ This senatusconsultum was first given under Claudius and then renewed under Vespasian. Tacitus, Ann. 11, 13; Suetonius in Vespas. c. 11. See thereon § 7, l. 4, 7, and Theophilus ad h. l.; Dig. 14, 6; Cod. 4, 28; Donellus, Comm. jur. civ. lib. 12, c. 24, 25; Leuchsen, Diss. de Seto, Macedoniano, Marb. 1828; Dutzel, Das Setum Macedon., Leipzig, 1859; Bucher, Recht der Forderung, § 94-96; Glück, Comm. Vol. 14, § 88, seq.; Unterholzner, Schuldverh. Vol. 1, §§ 72, 73.

⁶ fr. 1, pr. D. 14, 6; § 7, l. 4, 7. But it is applicable only to credit for ready money (*credita pecunia*), provided that in other credits naught will be transacted in violation of law (fr. 3, § 2, D. 14, 6; Weber, Nat. Verh., 4th ed. p. 214-217).

⁷ fr. 1, D. 14, 6; Theophil. ad § 7, l. 4, 7.

⁸ fr. 1, 2, 3, 4, 5, 6, 7, 9, § 4, 5, fr. 19, D. 14, 6; fr. 49, pr. D. 12, 6; Savigny, Oblig.-Recht, Vol. 1, p. 14, seq.

⁹ Const. 2, 4, 5, 7, C. 4, 28; fr. 7, § 15, D. 14, 6.

¹⁰ fr. 12, 16, D. 14, 6.

2. When the father appoints his son the master or husband of a ship, or has given him a *peculium* (means) to transact trade therewith, and permitted the son in that character or in relation to the business to take a loan of money.¹

3. When the loan was applied to the father's benefit, which also includes when expenditures were defrayed which were obligatory on the father² and when the child has borrowed money to ransom himself from captivity by war.³

4. When the loan was contracted and applied to the discharge of another valid debt.⁴

5. When the son at the time of taking the loan was a soldier.⁵

6. Or when the lender had good reason to suppose the son *sui juris*.⁶

7. When the loan itself is wholly invalid or the lender, because of his minority, can require restitution.⁷

In other cases the exception *senatusconsultum Macedonian* is denied only to the family child himself, which are the following:

8. If a child possess a property subject to his free disposition—thus a *castrense* or *quasi castrense peculium*, or at present also a *peculium adventitium extraordinarium* (§ 604, *infra*)—then he is bound unconditionally to the amount of this property.⁸

9. If the child, after it has become *sui juris*, has expressly or tacitly acknowledged or ratified the loan received.⁹ This occurs tacitly when the child, after it has become *sui juris*, commences the payment of the debt or gives security for it, whereby in both cases the whole debt is ratified; or if he give a pledge for it, then the debt only to the amount of the pledge is ratified.¹⁰

D. SEA LOAN (*trajectitia pecunia*).

§ 433. The rule that the debtor from the moment of the reception of the loan must bear the risk of it (§ 431, *supra*) has an exception in the sea loan (*trajectitia pecunia*); by which is understood a loan in money or in wares which the debtor purchased with the money to be sent by sea, and whereby the creditor, according to the contract, assumes the risk of the loss from the day of the departure of the vessel till the day of her arrival at her port of destination.¹¹ Interest does not necessarily arise from this loan, but when it is stipulated for it is termed *nauticum fœnus* (maritime interest), and because

¹ fr. 7. § 11. D. 14. 6. See *infra*, Chap. 3, Tit. 3.

² *E. g.*, fr. 7. §§ 12. 13. D. 14. 6; Const. 2. 5. C. 4. 28.

³ Novel 115. c. 3. § 13.

⁴ fr. 7. § 14. D. 14. 6.

⁵ Const. 7. § 1. C. 4. 28.

⁶ fr. 3. pr. § 1. fr. 19. D. 14. 6; Const. 2. C. 4. 28.

⁷ *E. g.*, fr. 3. § 2. D. 14. 6.

⁸ fr. 1. § 3. fr. 2. D. 14. 6.

⁹ Const. 2. C. 4. 28.

¹⁰ fr. 7. § 16. fr. 9. pr. D. 14. 6; *Joppert*, Diss. de mutuo a filiofam. 2d ed., Giessen, 1775. Respecting fr. 9 pr. 14. 6, see *Glück*, Comm. Vol. 14, p. 327.

¹¹ Dig. 22. 2; Cod. 4. 33; Novel 106–110; *Hudtwalker*, de fœnore nautico Romanorum, Hamburg, 1810; *Cock*, Diss. de fœnore nautico, Leodii, 1829; *Glück*, Comm. Vol. 21, § 1139–1143.

of the risk which the creditor assumes he is permitted to receive a higher interest than usual for the time of its continuance, even to twelve per cent.;¹ and by the Roman law an action may be instituted on a pact for it.²

II. COMMODATUM.

A. IDEA.

§ 434. The commodatum³ is a contract by which one party delivers to another an unconsumable thing⁴ for use⁵ without indemnity,⁶ with the view that the other will return the thing *in specie* after it has been used.⁷ The lender is termed *commodans* (commodator); the receiver is now termed *commodatarius* (commodatary).⁸

B. EFFECT.

1. Obligations of the Commodatary.

§ 435. By this contract the commodatary is bound—

1. To exercise the greatest care on the thing lent. He is bound for every fault (*culpa*) on his part, but not for purely casual damages.⁹

2. He can only make the use of the thing agreed on, but if he use it for another purpose he is liable for casual damages.¹⁰

¹ fr. 4. § 1. D. 22. 2; Const. 26. § 1. C. 4. 32.

² fr. 5. § 1. fr. 7. D. 22. 2. See *supra*, § 431, note 4, p. 335.

³ Paul, II. 4; § 2. I. 3. 14. (15); Dig. 13. 6; Cod. 4. 23; *Donellus*, Comm. jur. civ. Lib. 14, c. 2. 3; *Glück*, Comm. Vol. 13, § 853, *seq.*; *Bucher*, Recht der Ford. §§ 97, 98; *J. Van Reigersberg*, Diss. de commodato, Leyden, 1825; *Unterholzner*, Schuldverh. Vol. 2, p. 552, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 351, *seq.*; *Molitor*, T. 2, p. 475, *seq.*

⁴ fr. 3. § 6. fr. 4. D. 13. 6. Movable things are generally the object of the commodatum; the object may also be immovable things: fr. 1. § 1. D. 13. 6.

⁵ It is essential that the receiver shall have a right to the use. If this requisite be wanting, then it is not a commodatum, but a *precarium* (§ 447, *infra*). But if that requisite exist, then the transaction is a commodatum, even if the nature of its use be not determined. In such case it depends on the presumed will of the contracting parties: *Vangerow*, § 691, No. 6.

⁶ When a compensation (*merces*) is to be paid, it is an hiring or letting: § 2. I. 3. 14. (15) in fin.

⁷ Hence the commodatary does not become owner of the thing, as by the *mutuum* (loan of fungible things): § 2. I. 3. 14. (15); fr. 9. D. 13. 6; nor does he bear the risk of the thing.

⁸ By the Romans he was termed *qui commodatum accepit* or *is, cui commodata res est*: fr. 3. § 3. fr. 5. § 2. D. 13. 6; fr. 14. § 10. D. 47. 2.

⁹ § 2. I. 3. 14. (15); fr. 5. § 2-9. D. 13. 6. Yet there are exceptions to this, when, namely, something else has been agreed on, or the commodator only lent the thing for his own benefit: fr. 5. § 10-12. fr. 18. pr. D. 13. 6. The commodatary is not bound to compensate for the deterioration which the thing suffered by the simple use in a proper manner: fr. 23. D. 13. 6; *Loär*, Theorie der Culpa, p. 160; *Hasse*, Von der Culpa, 2d ed. 376.

¹⁰ §§ 6. 7. I. 4. 1; § 2. I. 3. 14. (15); fr. 18. pr. D. 13. 6.

3. After the use of the thing he must immediately return it to the commodator *in specie*.

4. If the thing be lent to several, then generally they are answerable *in solidum* as well for the thing itself as for the damages.¹ The action given to the commodator against the commodatary for the enforcement of these obligations is the direct *commodati* action.

2. Obligations of the Commodator.

§ 436. The commodator—

1. Is generally only answerable for trivial faults (*lata culpa*).²

2. He must leave the thing with the commodatary till the use agreed on has been made of it.³

3. He must reimburse the commodatary those expenses which he had to pay for the preservation of the thing, but only for those that are not usual or in some measure important.⁴ For the enforcement of these obligations he can be sued by the commodatary in the *contraria commodati* action.⁵

III. DEPOSIT (*depositum*).

A. IDEA.

§ 437. Deposit (*depositum*)⁶ is a contract by which one delivers to another a thing for gratuitous⁷ safe-keeping.⁸ The receiver is termed depositree (*depositorius*);⁹ the one that delivers it is termed depositor (*deponens*). When one is compelled by necessity to deliver his things to another for preservation, such deposit is now termed a *depositum miserabile*.¹⁰

B. EFFECT.

1. Of the Obligations of the Depositree.

§ 438. By this contract the depositree is bound—

1. To keep safely the thing. Generally he dare not use it,¹¹ excepting when he is permitted to do so expressly or tacitly. If the thing be not

¹ fr. 5. § 15. fr. 6. D. 13. 6.

² fr. 18. pr. § 3. fr. 22. D. 13. 6. But see § 435, *supra*, note 9.

³ fr. 17. § 3. D. 13. 6.

⁴ fr. 18. §§ 1. 2. fr. 21. 22. D. 13. 6.

⁵ fr. 17. § 1. fr. 21. pr. fr. 22. D. 13. 6.

⁶ § 3. I. 3. 14. (15); Dig. 16. 3; Cod. 4. 34; Paul, II. 12; Coll. Leg. Mosaic. tit. 10; *Donellus*, Comm. jur. civ. Lib. 14, c. 2; *Glück*, Comm. Vol. 15, § 938, *seq.*; *Bucher*, Recht der Ford. §§ 99, 100; *Unterholzner*, Schuldverh. Vol. 2, p. 659, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 371, *seq.*; *Molitor*, T. 3, p. 1, *seq.*

⁷ When a compensation is paid for it, it becomes a letting and hiring: fr. 1. § 8. D. 16. 3.

⁸ fr. 1. pr. D. 16. 3. It is also termed *commendatum*: fr. 186. D. 50. 16.

⁹ fr. 1. § 36. D. 16. 3.

¹⁰ § 17. I. 4. 6; fr. 1. §§ 1. 3. D. 16. 3.

¹¹ § 6. I. 4. 1; Const. 3. C. 4. 34.

fungible, then the contract assumes the character of hiring and letting or *commodatum*, according if something be paid for the use or if the use be regarded as an equivalent for the keeping.¹ But if the deposit consist of money, then is to be distinguished—

a. When the hitherto depositee is by a new agreement allowed the use, then the deposit immediately changes into a loan.²

b. When the depositor at the time of deposit permitted the depositee to use the money at his pleasure, in such case the deposit changes into a loan when the depositee exercises such permission.³

c. When the money is simply given to the depositee on condition to keep safely, and to return the same amount, when in doubt this condition is inferred, when it was delivered open, *e. g.*, when it was counted out. Though by this the depositee is tacitly allowed the use of the money, yet the transaction is notwithstanding not a loan, but a deposit; hence in this case it is generally termed *depositum irregulare*.⁴

2. With the regular deposit the depositee is only answerable for fraud (*dolus*) and gross wrong (*lata culpa*), but his condemnation for either of these results in infamy.⁵

3. The depositee is bound to return the thing either to the depositor himself, as soon as he desires its return, or to him to whom according to the depositor's will it shall be restored.⁶ The right of the depositor to demand the return of the thing at any time cannot be limited by agreement.⁷

4. For the fulfillment of all these obligations the depositor can institute the direct *depositi* action against the depositee.⁸

2. Of the Obligations of the Depositor.

§ 439. The depositor is bound to hold the depositee harmless, and in this view is liable—

1. For every wrong (*culpa*), because he is benefited by the contract.⁹

2. He must also reimburse the depositee such expenses as he applied to the preservation of the thing or which will be caused by its restitution.¹⁰ For the enforcement of these obligations he can be sued by the depositee in the *contraria depositi* action.¹¹

¹ fr. 1. § 9. D. 16. 3; fr. 76. pr. D. 47. 2.

² fr. 9. § 9. D. 12. 1; fr. 34. pr. D. 17. 1. See *supra*, § 431, note 2.

³ fr. 1. § 34. D. 16. 3; fr. 10. D. 12. 1.

⁴ fr. 25. § 1. D. 16. 3; fr. 31. D. 19. 2.

⁵ § 3. I. 3. 14. (15); fr. 1. §§ 8. 10. 47. fr. 31. D. 16. 3; fr. 1. D. 3. 2; *Löhr*, *Theorie der Culpa*, p. 147; *Hasse*, *von der Culpa*, 2d ed. pp. 370, 372.

⁶ fr. 26. pr. D. 16. 3; Const. 8. C. 3. 42.

⁷ fr. 1. §§ 45. 46. D. 16. 3; Const. 11. pr. C. 4. 34.

⁸ § 3. I. 3. 14. (15).

⁹ fr. 5. § 2. in fin. D. 13. 6; *Löhr*, *supra*.

¹⁰ fr. 12. pr. fr. 23. D. 16. 3.

¹¹ fr. 5. pr. D. 16. 3.

C. SEQUESTRATION.

§ 440. Sequestration is a particular kind of deposit; it consists in the safe-keeping and, according to circumstances, also in the management of a thing, because of a dispute concerning it or for other special reasons, under the obligation, when the cause for sequestration has ceased, to deliver the thing to him to whom the judge has awarded it or to him who is otherwise entitled to it.¹ Generally such a sequestration can only be ordered with the consent of the possessor of the thing (*sequestum voluntarium*),² but it also may be exceptionally ordered by the judge against the possessor's will for special reasons (*sequestum necessarium*).³ Frequently sequestration assumes the nature of another kind of transaction, and this is the case when the management and use of the thing is transferred to the sequestrator. The action arising from sequestration adapts itself to this change. If the sequestration be in effect a pure deposit, then the action thereon is the *depositi* action, with the addition of *sequestraria*; should hiring or letting or a *mandatum* be connected with it, then the action *locati vel conducti*, with the adjunct of *mandati sequestraria*, is the proper one.⁴

IV. OF PLEDGES.

A. OBLIGATIONS OF THE PLEDGEE.

§ 441. Pledge,⁵ *pignus, contractus pignoris*, now termed *contractus pignoratitius*, consists in the delivery to a creditor of a thing for the security of his claim.⁶ By this the pledgee is bound—

1. As soon as his right to the pledge ceases, to return the thing pledged.
2. He is liable for every wrong (*culpa*);⁷ he dare not use the pledge

¹ fr. 110. D. 50. 16; fr. 5. § 1. fr. 6. fr. 17. pr. D. 16. 3; fr. 9. § 3. D. 4. 3; Cod. 4. 4. The thing may be immovable as well as movable. Usually sequestration is applicable to things in dispute, but it may also be applied to things respecting which there is no suit, *e. g.*, to a *dos* which the husband commences to squander: fr. 22. § 8. D. 24. 3. Persons also may be subjected to a special superintendence, *e. g.*, fr. 1. § 10. D. 24. 4; fr. 3. § 4-6. D. 43. 30; and in the canon law there is an example of the sequestration of a bride, respecting whom several contended: cap. 14. X. 4. 1. On sequestration generally, see *Gönnér*, Handb. des Processes, Vol. 4, p. 368, 2d ed.; *Muther*, Sequestration und Arrest im Röm. Recht, Leipzig, 1856.

² Because of Const. un. C. 4. 4.

³ *E. g.*, fr. 21. § 3. D. 49. 1; fr. 7. § 2. D. 2. 8; Const. 3. in fin. C. 7. 18; fr. 22. § 8. D. 24. 3.

⁴ fr. 12. § 2. D. 16. 3; fr. 9. § 3. D. 4. 3.

⁵ § 4. I. 3. 14. (15); Dig. 13. 7; Cod. 4. 24; *Donellus*, Comm. jur. civ. Lib. 15, c. 49; *Glück*, Comm. Vol. 14, § 861-875; *Bucher*, Recht der Ford. §§ 101, 102; *Unterholzner*, Schuldverh. Vol. 2, p. 849, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 411, *seq.*; *Molitor*, T. 3, p. 77, *seq.*

⁶ The same effect takes place when an hypothecarial creditor comes into possession after a right of pledge: fr. 11. § 5. D. 13. 7; fr. 34. D. 39. 2; *Glück*, p. 155.

⁷ fr. 13. § 1. D. 13. 7; § 4. I. 13. 14. (15); Const. 19. C. 8. 14; Const. 5. 6. 8. C.

without special permission (§ 346, *supra*), otherwise he is liable for casual damages resulting to it.¹

3. For the enforcement of these obligations he can generally,² after the payment of the debt for which the pledge was given, be sued by the pledgor in the direct *pigneratitia* action.³ Hence this becomes prescriptible from the time of payment.⁴

B. OBLIGATIONS OF THE PLEDGOR.

§ 442. On the other hand, the pledgor is bound to hold the pledgee harmless.

1. He must reimburse the pledgee such expenses as were necessary for the preservation of the thing, as also for its essential improvement, if they are not exorbitant.⁵

2. He must answer for fraud (*dolus*) and wrong (*culpa*).⁶

3. If he pledged another's property, or property in which a third person has a right which the pledgee could not retain, he is bound to pay the pledgee for all the injury he may suffer.⁷

4. When the pledge lacks an alleged quality or has a hidden fault, he must compensate for the loss suffered.⁸ The action which the pledgee has for the enforcement of these obligations is termed *contraria pigneratitia* action.⁹

B. Innominate Contracts (*contractus innominati*).

I. IDEA.

§ 443. Since the time of the first Roman emperors the rule of law existed that in every lawful convention whereby one, in consideration of performance by another, promises that other a counter performance, such convention can be enforced by the action *præscriptis verbis* or the action *civilis in factum*, when the convention produces no action bearing a particular name, or if it be doubtful whether there be a particular named action, or which one

4. 24; *Lohr*, *Theorie der Culpa*, p. 149; *Hasse*, *Culpa*, 2d ed. pp. 158, 374; *Gesterding*, *Pfandrecht*, § 31.

¹ § 6. I. 4. 1; fr. 11. § 1. D. 20. 1; fr. 8. D. 20. 2.

² Suit may be instituted earlier for compensation for the injury: fr. 43. D. 13. 7. For other exceptions, see *Dernburg*, *Pfandr.* § 18, No. III.

³ See note 5, p. 340; *Glück*, p. 156, *seq.*; *Fresenius*, *Diss. de pigneratitia*, Heidelberg, 1818.

⁴ fr. 9. §§ 3. 5. D. 13. 7; Const. 10. 12. C. 4. 24. See *supra*, § 215, div. 2, and the writers there cited; *Mousson*, *Diss. de prescriptione actionis pigneratitia directæ*, Tübingen, 1796; *Dernburg*, § 18, No. III.

⁵ fr. 8. pr. fr. 25. D. 13. 7; Const. 7. C. 4. 24; *Gesterding*, *Pfandrecht*, § 29.

⁶ arg. § 4. I. 3. 14. (15); fr. 1. § 2. fr. 31. fr. 36. D. 13. 7.

⁷ fr. 9. pr. fr. 16. § 1. fr. 32. fr. 36. § 1. D. 13. 7; *Dernburg*, § 19, lit. c.

⁸ fr. 54. D. 46. 1.

⁹ fr. 8. pr. D. 13. 7; *Gesterding*, *Pfandrecht*, § 52.

can be instituted.¹ Such conventions the Romans designate as contracts for which the *jus civili* had no name.² Now they are termed *innominate contracts*. They are of two kinds: one when the plaintiff was promised, at the gift of a thing, a return gift, without the case belonging to the designated real contracts;³ the other when, on a performance by him, he stipulated for a counter performance, without the case belonging to the consensual contracts. The innominate contracts of the latter kind can, as was done by Paul, be reduced to the following four: *do ut des, do ut facias, facio ut des, facio ut facias*.⁴ There are, however, many modifications of each of these, and they may also be adapted to the forbearance of an act.⁵ The obligation and action in all these conventions arise through a gift or other performance on the one part.⁶

II. THE LEGAL NATURE OF INNOMINATE CONTRACTS.

§ 444. As a particular characteristic of the Roman law, it deserves to be remarked that in those innominate contracts which are based on the gift of a thing there was a *jus pœnitendi*, i. e., he who gave another something for which the other should have given or performed something in return had the choice, when the other had not fulfilled his assumed counter obligation, whether he would sue him for the fulfillment in an action *præscriptis verbis* or whether he would abandon the convention. If he chose the latter, then he could redemand the gift, as in the case when a performance has been made and the counter performance has not been made, by the *condictio causa data causa non secuta*, or, as it is also termed, *condictio ob causam datorum*.⁷ This *jus pœnitendi* did not extend farther.⁸

¹ Dig. 19. 5; Cod. 4. 64; Glück, Comm. Vol. 18, § 1075; Bucher, Recht der Ford. § 111–115; Gans, Über röm. Obligationenrecht, Heidelberg, 1819; Meno Pöhls, Lehre von den Innominatcontracten, Heidelberg, 1821; Erzleben, De contractuum innominatorum, Göttingen, 1835.

² fr. 3. D. 19. 5.

³ Thus especially in the *precærium* (§ 447, *infra*), and when the donor of a *dos* is promised the return of it, without stipulation, in the event of the cessation of the marriage (§ 568, *infra*).

⁴ fr. 5. pr. D. 19. 5; fr. 1. § 4. fr. 15. 22. D. 19. 5. Respecting the case *facio ut des*, there does not appear to have been unanimity; fr. 5. § 3. D. 19. 5.

⁵ fr. 13. fr. 17. D. 19. 5.

⁶ fr. 7. § 2. D. 2. 14. This explains why a *nudum pactum*, as soon as it has been performed by one party, is regarded as a contract and an action allowed on it: Const. 1. C. 5. 14.

⁷ Dig. XII. 4. fr. 5. §§ 1. 2. fr. 7. D. 19. 5; fr. 1. § 4. D. 19. 4; Const. 1. C. 5. 14.

⁸ The action (*condictio*) cannot be instituted before the counter performance is due, though fr. 3. §§ 2. 3. fr. 5. pr. §§ 1. 2. D. 12. 4. was believed to express the contrary. But these cases refer to an actual *mandatum*, of which one is expressly spoken of in fr. 27. § 1. fr. 30. D. 17. 1. The *jus pœnitendi* exists no longer, and an action can only be instituted for performance (§ 394, *supra*, at the end).

III. OF THE SEVERAL KINDS OF INNOMINATE CONTRACTS.

A. EXCHANGE.

§ 445. The following innominate contracts should be particularly noticed:

The contract of exchange, which consists in one thing being given for another.¹ It has a great analogy to the contract of sale, and the same principles are applicable as in that contract, excepting where the peculiarity of innominate contracts and of exchange does not permit such application.²

1. Thus the property in the thing passes immediately by delivery, even if counter performance be not made or credited.³

2. In exchange, the thing which one gives to another must be his actual property, and will also become immediately the actual property of the receiver. On the contrary, in sale, if the vendor do not knowingly sell another's thing, he is not liable for it till the thing be evicted from the vendee.⁴

B. THE CONTRACT OF COMMISSION.

§ 446. This contract (*contractus æstimatorius*) consists in the delivery of a thing to another to sell on condition that he will either return the designated price for it or the thing itself.⁵ The broker does not become owner of the thing, but bears the risk of it when he requested the other to permit him to sell it.⁶ Besides this, he is only answerable for fraud (*dolus*) and wrong (*culpa*).⁷ The action *præscriptio verbis*, which is for the enforcement of this contract, has the supplementary term *æstimatoria* or *de æstimato*.⁸

C. PRECARIUM.⁹

§ 447. *Precarium* is a convention whereby one allows another the use of a thing or the exercise of a right gratuitously till revocation.¹⁰ The bailee, who is only liable for fraud (*dolus*) and gross negligence (*lata culpa*),¹¹ acquires thereby the lawful possession of the thing, excepting when it has been ex-

¹ Dig. 19. 4; Cod. 4. 64; fr. 5. § 1. D. 19. 5; Glück, Comm. Vol. 18, § 1068-1074; Unterholzner, Schuldverh. Vol. 2, p. 300, seq.; Koch, Recht der Ford. Vol. 3, p. 682, seq.; Mulitor, T. 2, p. 169, seq.

² Const. 2. C. 4. 64.

³ Const. 4. C. 4. 64.

⁴ fr. 1. pr. § 1. 3. D. 19. 4; fr. 5. § 2. D. 19. 5; Const. 1. C. 4. 64; Const. 29. C. 4. 45.

⁵ Dig. 19. 3; Glück, Comm. Vol. 18, § 1065-1067; Erzeleben, *supra*, § 26; Unterholzner, Schuldverh. Vol. 2, p. 303, seq.; Koch, Recht der Ford. Vol. 3, p. 832, seq.

⁶ fr. 1. § 1. D. 19. 3; fr. 17. § 1. D. 19. 5; Mommaen, Beitr. Abth. 1, p. 280, seq.

⁷ fr. 17. § 1. D. 19. 5.

⁸ fr. 1. pr. D. 19. 3.

⁹ Paul, V. 6; Dig. 43. 26; Cod. 8. 9; Donellus, Comm. jur. civ. Lib. 14, cap. 34; Buckell, Diss. de precario. Marb. 1820; Degener, Über den Begriff des Prec., Leipzig, 1831; Unterholzner, Schuldverh. Vol. 2, p. 119, p. 561, seq.; Koch, Recht der Ford. Vol. 3, p. 366, seq.; Bulling, Das Precarium, Leipzig, 1846.

¹⁰ fr. 1. pr. fr. 2. § 3. fr. 3. fr. 6. § 4. D. 43. 26.

¹¹ fr. 1. § 3. D. 43. 26; Hase, Von der Culpa, p. 499.

pressly agreed or from the nature of the case itself it arises that he shall only have the detention of it.¹ The bailor can redemand the thing at any time, even should he have allowed it to the bailee for a designated period,² and on refusing to return it, he may enforce the return by the interdict *de precario* (§ 264, *supra*), or by the action *præscriptis verbis*.³ If the *precarium* has been agreed for a designated period, then it will be tacitly extended if at the expiration of the time the bailor does not redemand the thing. At the bailee's death the *precarium* ceases of itself if it has not been expressly extended.⁴

D. TRANSACTIO.⁵

§ 448. Concession (*transactio*) was not always, but sometimes, classed by the Romans as an innominate contract.⁶ A convention whereby, in a disputed, doubtful or uncertain right⁷ between them, each of two or more persons relinquishes something for the benefit of the other⁸ is termed *transactio*.

1. In regard to its efficacy, according to the Roman law it depended on whether it were concluded by stipulation or not. In the former case (§ 449, *infra*) it was obligatory and founded the action *ex stipulatu* for its enforcement, and when a conventional penalty was stipulated in the event of violation of the concession, this could be enforced by the action *ex stipulatu* (§ 450, *infra*). In the latter case, he who performed and thereby made it an innominate contract (§ 443, *supra*) could sue the other in an action *præscriptis verbis* for performance.⁹ If neither the one nor the other were the case, then it was only a *nudum pactum* (§ 459, *infra*).¹⁰

¹ fr. 4. § 1. D. 43. 26; fr. 33. § 6. D. 41. 3; fr. 10. pr. § 1. fr. 21. § 3. D. 41. 2; Savigny, Das Recht des Besitzes, § 25; Schmidt, Das commod. und das prec., Leipzig, 1841.

² fr. 12. pr. D. 43. 26.

³ fr. 1. pr. fr. 2. § 2. D. 43. 26. Originally the bailor of the *precarium* had no other action than the action *in rem*. But the prætor gave to him an especial protection by interdicts, and especially by the interdict *de precario*. Under the emperors he finally acquired the *præscriptis verbis* action, whereby the *precarium* became a contract and even an innominate one.

⁴ fr. 4. § 4. fr. 12. § 1. D. 43. 26.

⁵ Cod. Theod. 2. 9; Dig. 2. 15; Cod. 2. 4. Decretal 1. 36; Donellus, Comm. ad tit. Cod. de transactionibus; Glück, Comm. Vol. 5, p. 1, *seq.*; Unterholzner, Schuldverh. Vol. 1, p. 658, *seq.*; Koch, Recht der Ford. Vol. 3, p. 912, *seq.*; Redlich, Comm. de transactionibus, Leipsic, 1824; Molitor, T. 3, p. 286, *seq.*

⁶ See note 9.

⁷ Every concession presumes something uncertain and doubtful: fr. 1. D. 2. 15. Therefore no concession occurs *post rem judicatam* respecting the adjudged thing: fr. 23. § 1. D. 12. 6; Const. 32. C. 2. 4; fr. 207. D. 50. 17.

⁸ fr. 1. D. 2. 15; Const. 38. C. 2. 4; Const. 3. C. 6. 31.

⁹ fr. 16. D. 2. 15; Const. 6. 17. 20. 33. 37. 38. C. 2. 4.

¹⁰ Const. 21. C. 2. 3; Const. 9. 24. 28. C. 2. 4. At the present day this is immaterial; but every concession becomes by the agreement of the parties perfectly obli-

2. If in a concession an error occur, then this affects either the disputed or doubtful point that existed or a point which the parties did not consider doubtful. In the first case it has no influence whatever, but only in the second.¹

3. Both parties must also secure the eviction for each other in regard to that which the one gives the other in concession, but not when one party only relinquishes his demands on the disputed thing for the benefit of the other party in concession and the latter was afterwards evicted of the thing by a third person.²

III. Obligation from Words (*verborum obligatio*).

STIPULATION.

A. IN GENERAL.

§ 449. A verbal obligation (*verborum obligatio*), which was founded by the observance of a solemn verbal form (*solemnibus verbis*, obligatio quæ *verbis* contrahitur), arose in the former *dictio dotis* (§ 564, *infra*), in the so-named *promissio operarum jurata a liberto facta* (performance of services by the emancipated),³ and in the general stipulation.⁴ The latter is a convention which is formed by a verbal question directed to the performance of a thing, and immediately assented to by a verbal answer.⁵ When this is done, then, according to an ordinance of Leo, it is immaterial whether the stipulation be clothed in obsolete or other words.⁶ A stipulation among persons qualified for it is valid, according to an ordinance of Justinian, when the promisor had acknowledged this in writing and did not show that one of the alleged contracting parties was at another place during the whole day on which the document was made.⁷ Stipulations and records concerning stipulations with the Romans were more frequent, and the more important as with them every accepted promise did not found an action except when it was clothed in a stipulation (§ 396, *supra*). A stipulation gave rise to a *condictio* and an

gatory, and founds, in addition to an exception against the relinquished right, also an action for its enforcement.

¹ Const. 10. 42. C. 2. 4.

² Const. 33. C. 2. 4.

³ Dig. 38. 1; Cod. 6. 3.

⁴ Gaius, III. § 92-127; Inst. 3. 15. (16) 19. (20); Dig. 45. 1; Cod. 8. 38. and 39; *Donellus*, Comm. jur. civ. Lib. 12, c. 15, 18; *Van der Heim*, Diss. de contrahenda et committenda stipulatione, Leyden, 1813; *Liebe*, Die stipulation und das einfache versprechen, Braunschweig, 1840; *Girtanner*, Die stipulation, etc., Kiel, 1859; *Savigny*, Obl.-R., Vol. 2, § 73.

⁵ pr. § 1. I. 3. 15. (16); fr. 1. § 7. D. 44. 7; fr. 1. pr. D. 45. 1; Const. 10. C. 8. 38.

⁶ Const. 10. C. 8. 38; pr. § 1. I. 3. 15. (16). Formerly it depended greatly on the form: stipulations could in general be entered into, e. g., with peregrines, but not with the words *dare spondere*? which probably contain the oldest form of stipulation: Gaius, III. §§ 93. 94.

⁷ Const. 14. C. 8. 38; § 12. I. 3. 19. (20).

action *ex stipulatu*, and when the object stipulated consisted in a certain sum of money or in another thing precisely determined which should be given, it was usually termed *certi conductio*.¹

B. STIPULATION FOR A PENALTY.

1. *Pænæ stipulatio*.²

§ 450. The Romans term that a penal stipulation (*pænæ stipulatio*) when one who is to perform for another promises, in the event of no, or an improper, performance by him; to do something for that other as a penalty. It is not necessary to remind the delinquent that the conventional penalty has been incurred.³ If it be incurred, then the creditor generally⁴ has the election whether he will sue for that which was promised or for the penalty.⁵

2. *Fidejussio*.

§ 451. *Fidejussio* is a kind of intercession by means of a stipulation. An intercession arises when one promises a creditor to assume his debtor's debt or give him a pledge for it.⁶ The intercedor may assume the debt instead of him for whom he intercedes, or the latter may still continue to be bound (cumulative intercession). Intercessions of the first kind are especially the *ex promissio* (§ 538, *infra*) and the convention whereby one in consideration that credit be given to a third person assumes to pay the creditor the debt,⁷ as when the intercedor takes in his own name a loan made to another. Intercessions of the latter kind are of the kind whereby one makes himself a correal debtor (§ 361, *supra*),⁸ such as the *fidejussio*, the *mandatum qualificatum* (§ 425, *supra*), the *constitutum debiti alieni* (§ 472, *infra*), and the giving of a pledge for another's debt.⁹

¹ pr. I. 3. 15. (16); fr. 74. D. 95. 1; fr. 9. 24. D. 12. 1. See Savigny, Syst. Vol. 5, p. 629, *seq.*

² Kerstern, De pœna conventionali, Leipsic, 1839; Liebe, Die Stipulation, p. 303, *seq.*; Koch, Recht der Ford. Vol. 2, p. 337, *seq.*; Unterholzner, Schuldverh. Vol. 1, p. 247, *seq.*; Savigny, Obl.-R. Vol. 2, § 80; Molitor, T. 1, p. 191, *seq.*

³ If the stipulation be for the omission of an act, then the penalty is incurred immediately. Respecting a fixed time for performance, see Const. 12. C. 8. 38. When no time is fixed, see fr. 115. § 2. D. 45. 2.

⁴ It may also be agreed that he may claim both at the same time: fr. 10. § 1. D. 2. 14; fr. 115. § 2. D. 45. 2; Const. 17. C. 2. 14. There are cases in which the action is only for the penalty: § 19. I. 3. 19. (20); fr. 115. § 2. D. 45. 2. A penalty may be agreed on that the debtor by paying it may be freed from his debt (*multa pœnitentialis*, forfeit money).

⁵ Const. 14. C. 8. 38.

⁶ See the citations in § 455, *infra*, note 1.

⁷ fr. 8. § 14. D. 16. 1. See fr. 29. pr. D. 16. 1; Const. 4. 19. C. 4. 29.

⁸ See fr. 17. D. 16. 1.

⁹ Const. 5. 7. C. 4. 29.

a. *Nature of Fidejussio*.¹

§ 452. *Fidejussio*, according to the Roman law, is a promise made to be responsible for the payment of another's debt by means of a stipulation. It may be in all kinds of debts,² excepting such as are declared wholly invalid;³ but as its object is only security for the creditor, the surety may bind himself more severely than the principal debtor is bound, but not for something else and not for greater and not under more onerous conditions.⁴

b. *Effect of Fidejussio*.

§ 453. The effect of *fidejussio* in the relations between the surety and the creditor is—

1. The surety and his heirs must pay⁵ when the principal debtor cannot make payment,⁶ and if the surety undertook the suretyship absolutely (*in omnem causam*), he thereby became bound not only for the principal debt, but also for the accessions to it, so far as an unlimited pledge for it could be bound (§ 341, *supra*).⁷ but otherwise he is bound only for the principal debt.⁸

2. The creditor has the choice, according to strict law, whether he will first proceed against the debtor or the surety;⁹ yet, according to modern law,

¹ Gaius, III. § 115, *seq.*; Inst. 3. 20. (21); Dig. 46. 1; Cod. 8. 41; *Donellus*, Comm. ad tit. Cod. de fidejussoribus, in his works, Vol. 9, p. 1307; *Unterholzner*, Schuldverh. Vol. 2, p. 801, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 848, *seq.*; *Quinel*, De fidejussoribus sec. jus. Rom., Lovanii, 1825; *Westrik*, Disp. ad locum 'ail institutionum de sponsoribus, etc., Leyden, 1826; *Girtanner*, Die Bürgschaft nach gemeinem Civilrechte, Jena, 1850, 1851.

² § 1. I. 3. 20. (21); fr. 1. fr. 2. fr. 8. §§ 1. 2. fr. 16. § 3. fr. 37. D. 46. 1. The return of the *dos* only cannot be secured by surety: Const. 1. 2. C. 5. 20.

³ fr. 46. fr. 16. pr. fr. 32. D. 46. 1. How far a moral obligation (*obligatio naturalis*) can be secured by surety, see fr. 9. § 3. fr. 7. pr. D. 14. 6; fr. 7. § 1. D. 44. 1; fr. 25. D. 46. 1; fr. 95. § 3. D. 46. 3; fr. 13. pr. D. 4. 4; *Weber*, Von der natürl. Verbindl. § 112–115.

⁴ § 5. I. 3. 20. (21); fr. 1. § 8. D. 44. 7. If the surety had promised something different or more than the principal debtor owed, then, by the Roman law, he was not bound for anything: fr. 8. § 7. fr. 42. D. 46. 1. In the latter case, according to the present law, he is at least bound for the amount of the debt.

⁵ Formerly a maximum sum for surety (without distinction between *sponsio*, etc.) was fixed by a lex Cornelia: Gaius, III. §§ 124, 125.

⁶ fr. 2. I. 3. 20. (21); fr. 4. § 1. D. 46. 1. If, however, the surety show that the creditor by his own neglect failed in receiving satisfaction from the debtor, then, by the modern Roman law (see note 9, *infra*, and note 1, p. 348), he is released from the suretyship: fr. 41. pr. D. 46. 1; fr. 95. § 11. D. 46. 3; *Thibaut*, De fidejussore, Heidelberg, 1829; *Girtanner*, p. 483, *seq.*

⁷ fr. 54. pr. D. 19. 2; fr. 4. § 1. fr. 56. § 2. D. 46. 1; fr. 32. pr. D. 26. 7; fr. 88. D. 45. 1; fr. 24. § 1. D. 22. 1.

⁸ fr. 68. § 1. D. 46. 1.

⁹ Const. 5. C. 8. 41. If the surety, however, had only become responsible for that which the creditor cannot obtain from the debtor, then the latter must necessarily be first sued: fr. 116. D. 45. 1; Const. 1. C. 10. 2.

the sureties have the *beneficium ordinis s. excussionis*, by virtue of which they can demand that the creditor shall first sue the principal debtor.¹

3. Several co-sureties are of right bound *in solidum*, but have, according to the modern law, the *beneficium divisionis ex epistola D. Hadriani*, according to which the co-surety from whom the whole has been claimed can demand that so far as the other sureties are able to pay he shall only be liable for his part.²

4. The action of the creditor against the surety, with the Romans, was the action *ex stipulatio*. The effect of *fidejussio* on the relations between the principal debtor and the surety is when the surety has paid for the debtor he has the right to demand indemnification,³ when he at the debtor's request became security, in the *contraria mandati* action, otherwise he has the *contraria negotiorum gestorum* action, or *ex jure cesso* of the creditor,⁴ and for this purpose he has the *beneficium cedendarum actionum*, by virtue of which, before he pays the debt, he can require of the creditor the cession of his claim against the principal debtor, with all the securities.⁵

c. The Surety's Surety (*fidejussio fidejussionis*).

§ 454. The surety's surety (*fidejussio fidejussionis*) or second suretyship is undertaken with a twofold view, namely :

1. For the greater security of the creditor a second surety becomes liable for the first surety.⁶

2. For the security of the surety, as when one promises to hold him harmless if he must pay for the principal debtor (counter-surety).⁷

¹ Const. 5. C. 8. 41; Novel 4. c. 1; *Schaab*, Diss. de fidejussore, Mainz, 1786.

² Gaius, III. §§ 121, 122; § 4. I. 3. 20. (21); Const. 3. C. 8. 41. See *supra*, end of § 361; *Girtanner*, §§ 31, 32, p. 457, *seq.* In the ancient time, when the *sponsores* and *fidepromissores* were distinguished from the *fidejussores*, several *sponsores* or *fidepromissores* were liable when in doubt *in solidum*, but a *lex Apuleja* in this case gave him who paid more than one poll-part an action against the others, as if a partnership existed between them; and, according to the *lex Furia*, in Italy the obligation was divided into equal parts among those who at the time of the action were still living. This law caused the introduction of the *beneficium divisionis* for *fidejussores*, which then, outside of Italy, was also applied to *sponsores* and *fidepromissores*: Gaius, III. §§ 121, 122. With the above obsolete ordinance was combined what is communicated in Gaius, III. § 123.

³ The *sponsor* had formerly also the *depensi* action, a particularly favored action which plays its part in the history of the *legis actio per manus injectionem*: Gaius, III. § 127; IV. §§ 9, 22, 25, 102, 171, 186.

⁴ § 6. I. 3. 20. (21); fr. 4. pr. D. 46. 1; fr. 43. D. 3. 5; *Weber*, Von der nat. Verb. §§ 116, 117.

⁵ fr. 36. 39. D. 46. 1; Const. 2. 11. C. 8. 41; *Mühlenbruch*, Von der Cession, pp. 412-414, 445; *Girtanner*, p. 94, *seq.*, p. 211, *seq.*, p. 468, *seq.*

⁶ fr. 8. § 12. fr. 27. § 1. D. 46. 1; *Gründler*, Comm. de fidejussore fidejussoris, Halle, 1794.

⁷ fr. 4. pr. D. 46. 1.

d. *Suretyship by Females.*¹

§ 455. In general all who can bind themselves and have the free disposal of their property can become surety and intercede. To this there is an exception² in the case of females.

A. By the *senatusconsultum Velleianum* (under Claudius)—

1. Every intercession by a female, of whatever nature (§ 451, *supra*),³ is declared inoperative, and if the intercedor be sued on the intercession, she can protect herself against the creditor's action by the *exceptio Scti. Velleiani*,⁴ and if she paid in error of law she can redemand the payment by the *condictio indebiti*.⁵ If the intercedor use the exception *senatusconsultum* against the creditor's action, and the intercession were an *expromissio*, then the creditor acquires again his old action against the original debtor as *utilis* action (*actio restitutoria s. rescissoria*).⁶ But if the intercession were of the kind that by it a third person would be released from a future debt, then the creditor acquires against this the action based on the intercession of a female as *utilis* action (*actio institutoria*).⁷ Finally, if a female and a male together intercede for a third person, then the male alone is bound for the whole, unless both had bound themselves only *pro rata*, when the male is bound only for his proportion, while the creditor for the female's proportion has the action *restitutoria* or *institutoria* against the debtor.⁸

2. There were, however, already previous to Justinian several exceptional cases in which a woman could not invoke the aid of the *senatusconsultum Velleianum*, which cases include when she has been indemnified for the intercession;⁹ when she has acted fraudulently against the creditor;¹⁰ when the creditor was a minor;¹¹ when he erred in matter of fact, on which, according

¹ Paul, II. 11; Dig. 16. 1; Cod. 4. 29; Novel 134. c. 8; *Donellus*, Comm. jur. civ. Lib. 12, cap. 29–32; *Glück*, Comm. Vols. 14, 15, p. 920–927; *Kattenhorn*, Intercessionen der Frauen, Gieszen, 1840; *Windscheid*, De valida mulierum intercessione, Bonn, 1838.

² Soldiers and clergymen are also forbidden to become surety, but yet only in relation to business and fiscal matters: Const. 31. C. 4. 65; Novel 123. c. 6; *Girtanner*, p. 143, *seq.*, pp. 283, 368.

³ The *senatusconsultum* treats only of two cases; but it was extended in its application to the others: *Girtanner*, p. 133, *seq.*

⁴ fr. 2. § 1. D. 16. 1; Const. 1. 13. 16. C. 4. 29.

⁵ fr. 8. § 3. D. 16. 1; Const. 9. C. 4. 29. If she deposited a pledge for another's debt she can redemand it: fr. 32. § 1. D. 16. 1.

⁶ fr. 1. § 2. fr. 8. § 9–13. fr. 14. fr. 16. § 1. in fin. fr. 20. fr. 32. § 5. D. 16. 1; Const. 16. C. 4. 29.

⁷ fr. 8. § 14. D. 16. 1.

⁸ fr. 48. D. 46. 1; Const. 8. C. 4. 29.

⁹ fr. 16. pr. fr. 21. pr. fr. 22. D. 16. 1; Const. 2. C. 4. 29.

¹⁰ fr. 2. § 3. fr. 11. fr. 27. pr. fr. 30. pr. D. 16. 1; Const. 18. C. 4. 29; *Girtanner*, p. 344, *seq.*

¹¹ fr. 12. D. 4. 4; *Girtanner*, p. 346.

to the *senatusconsultum*, it depends whether it be an excusable error;¹ and when she promised the creditor that she would not invoke the exception *senatusconsultum*.²

B. Justinian added to the above-named exceptional cases—

1. When a female of full age at the time of the intercession confirms it after the lapse of two years.³

2. He also ordained that the intercession of a female, if not undertaken in a public document subscribed by three witnesses, shall *ipso jure* be null without requiring the calling to aid of the *senatusconsultum Velleianum*, excepting when the creditor can show that the intercedor was indemnified for the intercession.⁴

3. In two later constitutions he ordained that the *senatusconsultum* shall not be applicable when a female has interceded for the emancipation of a slave or for the giving of a *dos*.⁵

4. Justinian ordained by the Novel 134. c. 8, from which is taken the *Auth. Si qua mulier*. C. 4. 29, that the intercession of a wife for her husband shall absolutely be invalid, be it ever so often confirmed, and even if she had undertaken it in a public document, excepting when that for which she interceded was applied to her own benefit. The nullification *ipso jure*, by Justinian's ordinances, of an intercession will not be averted by the intercedor's renunciation of this benefit of a right according to Roman law.⁶

IV. Obligations from Writing (*literarum obligatio*).

I. ACTUAL CASES.

§ 456. As the verbal obligation (*verborum obligatio*) rests on a verbal, so the *literarum obligatio* rests on a written, form (*litteris contrahitur obligatio*). In the ancient law the *transcriptitia nomina* in the house-books and the *syngraphæ* and *chirographa* with the peregrines were included in these obligations.⁷ These ancient obligations from writing do not appear under

¹ fr. 4. pr. fr. 7. fr. 11. 12. 17. pr. § 1. fr. 27. pr. fr. 28. § 1. D. 16. 1; Const. 1. C. 4. 29; *Girtanner*, p. 344.

² fr. 32. § 4. D. 16. 1. See *Girtanner*, p. 136, *seq.*

³ Const. 24. C. 4. 29; *Girtanner*, pp. 140, 347.

⁴ Const. 23. C. 4. 29. Respecting the true meaning and extent of these constitutions there are very conflicting views: *Girtanner*, p. 351, *seq.*

⁵ Const. 24. 25. C. 4. 29; *Girtanner*, p. 141, *seq.*

⁶ But it may be by the canon law, by the confirmation of the intercession by an oath. On the different views, see *Glück*, *Comm.* Vol. 15, § 925.

⁷ On this *literarum obligatio* of the ancient law, see Cicero pro Roscio, c. 1–5, pro Cluentio, c. 14. 30. de off. III. 14. ad Attic. IV. 18. in Verrem II. 1. cap. 36, and Pseudo-Asconius ad h. l.; Gaius, § 128–134; Theophilus ad Inst. 3. 21. (22); *Hantlo*, Diss. de nominum obligatione, Amsterdam, 1825; *Kraut*, *Comm. de argentariis et nummulariis*, Göttingen, 1826, cap. 7–9; *H. Schüler*, Die literar. oblig. des ältern Röm. Rechts, Breslau, 1842. The ancient Roman contract from writing according to Gaius consisted herein: the creditor of a subsisting money demand

Justinian.¹ nor does he contain any new written obligations.² True, it was thought that the Institutes contained a certain case similar to the former *literarum obligatio*, but strictly considered this is no case of a contract from writing, but a case out of a real contract; and though it were not completed, nevertheless it could be prosecuted with effect because of a document which the defendant presented to the plaintiff, and which according to the laws it incontestably proves, inasmuch as the former did not properly protect himself at the right time against such proof. This case is connected with the doctrine of the exception *non numeratæ pecuniæ*, which therefore should be here treated on.³

II. THE EXCEPTION OF MONEY NOT PAID (*exceptio non numeratæ pecuniæ*).

A. IN LOAN.

§ 457. In the case of a loan⁴ an exception *non numeratæ pecuniæ* (money not paid), according to the Roman law, is applied in various ways.

changed it by *transcriptio* in his *codex accepti et expensi* into a *literarum obligatio*, which could occur only with the debtor's consent, without the debtor's personal presence being required, as in novation through stipulation. If the debtor were not changed, then the entry was termed *transcriptio a re in personam*; if the debtor were changed, which required the consent of the new debtor, then it was termed *transcriptio a persona in personam*. Respecting the *syngraphæ et chirographa* of the peregrines, which Gaius mentions, see, particularly, *Ueist*, Die form. Vertr. des neuern R. Obligationenr. pp. 331, 416, 476, *seq.*, 503, *seq.* *Syngraphæ* is an earlier, *chirographa* a later, term for debt-bills, as they usually were in the Greek provinces of the Roman states. As the Roman contract system was not in vogue with these provincials, so actions generally could be instituted on these simple debt-bills. This it is which Gaius mentions. The false Asconius, according to whom the *syngraphæ* was something totally different from the *chirographa*, contradicts the earlier information, and he lived too late to be recognized as authority.

¹ I. 3. 21. (22).

² Hence in the Pandect passages, which in their original form numbered four kinds of contracts, the mention of contracts from writing was struck out: fr. 1. § 3. D. 2. 14; fr. 1. § 1. fr. 4. D. 44. 7; fr. 8. § 1. D. 46. 1; fr. 1. § 1. D. 46. 2. In § 2. I. 3. 13. (14) it was permitted to remain; but this must be because the composers of the Institutes believed they must give at least a brief historical sketch respecting this once existing contract, and which they would rather first give at the place where Gaius treated on it, i. e., in the title *de literarum obligationibus*, as they much desired to use this rubric and opportunely to say a few words respecting the modern exception *non numeratæ pecuniæ*, for which they found no more appropriate passages than those on which Gaius had already said so much of the *chirographa*, to which this exception relates, and at his time must have been said.

³ Respecting this nominal *literarum obligatio* of the modern law, see Inst. 3. 21. (22); Cod. 4. 30; *Donellus*, Comm. ad. tit. Cod. 4. 30; *Glück*, Comm. Vol. 12. § 786-788; *Muer*, De vera exceptionis non numeratæ pecuniæ indole, Wirceb. 1807; *Einert*, Ueber das Wesen u. die form des Literalcontracts, Leipzig, 1852.

⁴ Respecting the interest promised, see note 4, p. 335, *supra*.

1. By the Roman law an action could be instituted for the repayment of a loan given as capital, even without a stipulation; yet a stipulation for it was frequently entered into, and the usual action that could be instituted was on the stipulation.¹ And according to strict law this action could be instituted when a loan was advanced in the expectation that the stipulation for it would be made unconditional, which was not done.² As here the stipulation was entered into without consideration (*sine causa*), the promisor could set up the exception *doli*³ or the exception *non numeratæ pecuniæ*.⁴ He could also demand with the *condictio sine causa* that the stipulation should be made retroactive by *acceptilatio*, and he *ipso jure* be thereby released.⁵ If the stipulator (loanor) could otherwise prove the making of the loan which was denied, then he shows that the exception *non numeratæ pecuniæ* as well as the *condictio sine causa* is unfounded, without its depending on how much time had elapsed since the stipulation. And the same may be said when the stipulator had in his hands a document of the promisor respecting the entering into of the stipulation.

2. But if such a document also contained an acknowledgment that the promisor received the loan, then he could, according to a general rule respecting documentary proof, only disprove it by another document, and this was admissible however long a time had elapsed after the document was drawn. However, under the later emperors the exceptional rule arose that in such case the making of the loan is not proved by the document evidencing the debt in the first two years⁶ after the document was made, but must be shown in another way; and the same rule was applied at a later period when within the first two years the *condictio sine causa* was invoked or a proper protestation (*querela non numeratæ pecuniæ*) was made against the document;⁷ on the other hand, when this was omitted no counter proof was permitted.⁸

3. In the case when no document was drawn respecting a stipulation, but a simple document respecting the receipt of the loan,⁹ the action which the alleged loanor could institute was on the loan and not on the stipulation, and when for two years naught was done against the document such action would be successfully sustained. The objection allowed in the first two years was not a true exception, but a denial of the ground of complaint, which was also

¹ fr. 6. § 1. fr. 7. D. 46. 2. See fr. 126. § 2. D. 45. 1.

² Gaius, IV. § 116.

³ Gaius, l. c.; fr. 2. § 3. D. 44. 4.

⁴ fr. 4. § 16. D. 44. 4; fr. 29. pr. D. 17. 1.

⁵ fr. 1. 3. D. 12. 7.

⁶ At first it was one year, after Diocletian it was five: Herm. Cod. tit. 1. Since Justinian's Const. 14. pr. C. 4. 30. two years.

⁷ Const. 4. 6. 8. 9. 12. 14. § 4. Const. 15. C. 4. 30.

⁸ Const. 8. in f. Const. 10. 14. pr. C. 4. 30.

⁹ The most of the constitutions of the Code title 4. 30. designate the debt document in a manner which also answers for this kind. See Tit. I. 3. 20. (21).

improperly termed exception *non numeratæ pecuniæ*. The case when one by means of a document of this kind can sustain an action on the loan without really having made a loan is that which the Institutes regard as similar to the former contract from writing.¹ It must be borne in mind that here the action is the same as if the alleged loan had been really given, and that the plaintiff is not victorious because there exists another ground of action, but because the delivery of the loan must be regarded as proved.

B. IN THE DOS.

§ 458. In the case of *dos* there is a defence since Justinian somewhat similar² to that in § 457, for which the term *exceptio* is used, but only in an improper sense. When it is said in the dotal instrument that a *dos* is given, but which is not yet paid, then the husband or his heirs can protect themselves against the action for the restitution of the *dos* with the exception *dotis cautæ non numeratæ pecuniæ*, if the marriage be dissolved within two years, for the period of one year after such dissolution; if dissolved after two years, but within ten years, for the period of three months after the dissolution; and within this period he may also sue for the return of his written obligation. After the expiration of these terms, as also when the marriage endured for ten years, neither he nor his heirs can avail themselves of the above-mentioned action or of the exception *dotis cautæ sed non numeratæ*, but he is absolutely bound for the restitution of the *dos* which is mentioned in the dotal instrument as being given if he did not sue within the above period or enter a proper protest. But if on entering marriage he were a minor, then he has the term of twelve years to act respecting the non-receipt of the promised *dos*, and should he die prior to the expiration of this term, then his full-aged heir has one year and his minor heir five years from the dissolution of the marriage to the time of the action or exception *dotis cautæ sed non numeratæ*. After the expiration of these terms the dotal instrument is incontrovertible.³

¹ 3. 21. (22). It is deduced that this similarity is only found when a stipulation and a document thereon are wanting.

² See thereon, particularly, *Gneist*, p. 32, *seq.*

³ Novel 100, which repeals the Const. 3. C. 5. 15, by which formerly the *querela* or exception *dotis cautæ sed non numeratæ* in each case had a year after the dissolved marriage, as appears from the preface to Novel 100. compared with chap. 1. verb. "*nec annum dantes*;" *Glück*, Comm. Vol. 25, § 1239.

TITLE SECOND.

OF PACTS.¹

IDEA AND KINDS OF PACTS IN GENERAL.

§ 459. The Romans generally termed conventions *pacta* (pacts),² but especially those conventions whose object was the founding of claims which were not contracts. These pacts in general, according to the Roman law, did not produce an actionable obligation³ (*pacta nuda*). But several of them in the course of time became actionable (*pacta non nuda s. vestita*). Others, on the contrary, were prohibited.⁴ The pacts which were actionable by the Roman law,⁵ which will be spoken of hereafter, were divided, according to the grounds of their actionability, into *pacta adjecta*, *pacta legitima* and *pacta prætoria*.

I. Collateral Pacts (*pacta adjecta*).

1. IDEA.

§ 460. Those conventions are termed collateral pacts (*pacta adjecta*) which were immediately annexed to a *bonæ fidei* contract at the time of the making of it; they therefore immediately form a part of the contract itself, and hence may be enforced by an action on the contract.⁶ By such accessory conventions that is usually changed which otherwise would follow from the legal nature of the contract (*detrahitur contractui*); but they often establish

¹ Dig. 2. 14; Cod. 2. 3. See the writings cited in § 395, *supra*, note 11.

² See, *e. g.*, Cic. de invent. II. 22; Auct. ad Herenn. II. 13.

³ fr. 7. § 4. fr. 45. D. 2. 14; Const. 28. C. 2. 3. But, according to the general opinion, a moral obligation: fr. 84. § 1. D. 50. 17; fr. 1. pr. D. 2. 14; fr. 95. § 4. fr. 5. § 2. D. 46. 3; fr. 11. § 3. D. 13. 7; Const. 22. C. 4. 32. But see *Savigny*, Obl.-R. p. 53, *seq.*

⁴ The prohibited agreements have partly incidentally appeared and will partly appear again, *infra*, § 574. Here will be mentioned only the agreements for gaming and wager, which were not always prohibited.

1. Among the Romans only the gymnastic games were permitted, and these only to be played for a reasonable price: fr. 2. § 1. D. 11. 5; Const. 3. C. 3. 43. All others were in such a manner forbidden that not only no action and no moral obligation for payment arose, but even the loss paid could be recovered within fifty years: Const. 3. C. 3. 43. See, generally, Dig. 11. 5; Cod. 3. 43. (non-gloss); *Glück*, Comm. Vol. 11, p. 757, *seq.*; *H. Kock*, Disp. de alea, Utrecht, 1819; *J. E. Lange*, Rechtstheorie von dem Ausspielgeschäfts, Erlangen, 1818.

2. Wagers are generally permitted when they are connected with permitted games and forbidden when the games are forbidden: fr. 3. D. 11. 5. Such is the case when the object of the game is immoral: fr. 17. § 5. D. 19. 5. Fraud also invalidates a wager in which is included the case when one party knows certainly concerning a thing and conceals it from the other to induce him to wager. See *Glück*, *supra*.

⁵ At the present day every agreement which is not invalid or forbidden founds an obligation which can be enforced by an action, as has been stated *supra*, § 395

⁶ fr. 7. § 5. D. 2. 14; Const. 10. 13. C. 2. 3; Const. 2. C. 4. 54.

something which otherwise would not follow from the general legal nature of the contract (*adjectur contractui*).¹

2. SOME KINDS OF COLLATERAL PACTS.

§ 461. Among the accessory conventions which change and modify the principal convention² are—

1. The *pactum protimiseos*, whereby the vendor of a thing reserves the right of pre-emption in case the vendee should sell the same again. But the vendor must agree to the same offer and the same conditions which a third person bid.³

2. The *pactum de retrovendendo*, whereby the vendor of a thing reserves the right to demand that the vendee shall resell the same to him after or within a certain time.⁴

3. The *in diem addictio*, when it was agreed on that either the sale shall be retrogressive if within a certain designated time a better vendee be found or that it shall only be valid when within a certain designated time there be no better vendee.⁵

4. The *pactum de non præstanda evictione*, whereby the vendor is released from the obligation of guarantee from eviction.⁶

5. The *pactum commissorium*, or the *lex commissoria*, whereby it is agreed that the vendor shall be freed from his obligation if the vendee does not pay the purchase-price at the designated time.⁷

6. The *pactum displicentie*, whereby one or the other or both parties reserve the right of repentance for a designated time.⁸

7. The *antichresis*, arising in contracts for pledges, which has been explained *supra*, § 346.

8. The *pactum de non alienando*,⁹ whereby the acquirer of a thing is bound not to alienate the same for the advantage of a designated person.¹⁰

¹ fr. 7. §§ 5. 6. D. 2. 14; fr. 72. pr. D. 18. 1. Hence the rule, *Pacta dant legem contractui*.

² Respecting all these conventions, see, generally, *Westphal*, vom Kauf-Pacht-und-Mieth-contract, etc., p. 482-571; *Glück*, Comm. Vol. 16, § 990, seq.; *Bucher*, Recht der Forderungen, § 66.

³ fr. 75. D. 18. 1; fr. 21. § 5. D. 19. 1. Some persons have such a *jus protimiseos* rightfully, e. g., the *dominus emphyteusos*, Const. 3. C. 4. 66. (see *supra*, § 327), and, at the present day, the feudal lords and the successors to a fief: II. F. 9. § 1. See, generally, *Oeltze*, *Jus protimiseos*, Jena, 1767.

⁴ fr. 12. D. 19. 5; Const. 2. C. 4. 54.

⁵ Dig. 18. 2; *Donellus*, Comm. jur. civ. Lib. 16, c. 18; *Glück*, Comm. Vol. 16, § 1001-1005; *Musset*, Observat. de conventionibus, Wetzlar, 1813, cap. 1-3.

⁶ fr. 11. § 18. D. 19. 1.

⁷ Dig. 18. 3; Cod. 8. 35; *Donellus*, Comm. jur. civ. Lib. 10, c. 19; *Glück*, Comm. Vol. 16, § 1006-1012; *Albert*, Commissorischen Vertrag. bei Zeitpachtcontracten, Halle, 1822.

⁸ fr. 3. D. 18. 1.

⁹ *Carrard*, Diss. de pacto non alienando, Tübingen, 1789.

¹⁰ An accessory convention which frequently arises, but does not create an obli-

II. Legitimate Pacts (*pacta legitima*).

IDEA.

§ 462. *Pacta legitima* are those conventions to which the modern civil law has as an exception given actionability.¹ They include many others,² especially the pact of gift (*pactum donationis*), the pact promising a *dos*, and the arbitrament (*compromissum*) (§ 471, *infra*).

I. GIFT.³

A. IDEA⁴ AND KINDS.

§ 463. By gift (*donatio*) in its narrow and proper sense every generosity is understood whereby one without legal obligation diminishes his own property and increases the property of another who accepts it.⁵ The parties to the gift are the donor (*donans* or *donator*) and the donee (*donatarius*). The gift itself is either a gift in the event of death (*donatio mortis causa*) or a gift between the living (*donatio inter vivos*), according as its validity depends on the death of the donor or not.⁶ As the former is particularly treated on *infra*, § 793, *seq.*, the latter only will be spoken of in this place.

B. GIFTS BETWEEN THE LIVING (*donatio inter vivos*).

1. Subjects of Gifts.

§ 464. In relation to the persons in a gift between the living, generally every one who has the free disposition of his property can make such a gift, and every one can acquire by such a gift who generally is able to acquire property. Only both persons cannot stand in the same *patria potestas* (power of the same father), nor can one stand in the *potestas* of the other, such as the father and son.⁷

gation, is the *pactum reservati dominii* or *reservatæ hypothecæ*, whereby the vendor who credits the purchase price retains the property of the thing sold till the payment of the price, or for his security has an *hypotheca* on it.

¹ fr. 6. D. 2. 14. Those legitimate pacts in consequence of which an obligation was *ipso jure* dissolved are not included in these.

² Such as those whereby interest was promised for a loan exceptionally actionable (note 4, p. 335, § 433, *supra*) and the *constitutum* which Justinian first made actionable (note 9, p. 361, *infra*).

³ Paul, sent. rec. 5. 11; Fragm. Vat. § 248-316; Cod. Theod. 8. 12; Inst. 2. 7; Dig. 39. 5; Cod. 8. 54-56; *Donellus*, Comm. jur. civ. Lib. 5, cap. 2, L. 14, c. 26-32; *Savigny*, Syst. Vol. 4, p. 1, *seq.*, p. 18-165; *Klinkhamer*, Comm. de donationib. ex Vat. fragm. illustratis, Amsterdam, 1826; *Jouret*, Diss. de donationibus inter vivos ex jure Rom., Lovan. 1827; *Meyerfeld*, Die Lehre von den Schenkungen nach R. R. Marb. 1835, 1837.

⁴ *Meyerfeld*, Abschn. 1 und 2; *Savigny*, p. 18-165.

⁵ § 1. I. 2. 7; fr. 1. pr. fr. 29. D. 39. 5; fr. 38. D. 18. 1.

⁶ § 1. I. 2. 7; fr. 30. D. 39. 6.

⁷ fr. 1. § 1. D. 41. 6. Yet since the establishment of the *peculium* this has several exceptions: Const. 4. C. 3. 36; Const. 6. § 2. C. 6. 61; fr. 31. § 2. D. 39. 5; Const. 17. pr. C. 8. 54; Const. 25. C. 5. 16.

2. *Objects of Gifts.*

§ 465. The object of a gift may be everything which increases the property of the donee by the diminution of the property of the donor.¹ One may not only transfer property to the donee,² but may also concede to him rights in a thing (*jura in re*),³ concede a claim to a thing and cede the thing itself to him,⁴ release him from a debt,⁵ and for his benefit renounce acquired rights.⁶ In fact the entire property of the donor may be the object of a gift. But by this is understood only the net property of the donor after deducting debts; the donee attains a right only to the surplus.⁷ A universal succession is never founded by such a gift of all of the property (*donatio omnium bonorum*), hence the donee cannot be immediately made liable for the donor's debts.⁸

3. *Of the Kinds of Gifts between the Living.*

§ 466. The gift is either pure (*donatio mera*) when it rests solely on the generosity of the donor,⁹ or it is prompted by a performance by the donee (*donatio non mera*). If something be given as compensation for services performed or benevolence received, then the gift is remuneratory (*donatio remuneratoria*).¹⁰ If something be given for the attainment of an object, then it is a conditional gift (*donatio sub modo*).¹¹ The non-fulfillment of a condition annexed to a gift the Roman law regards as the violation of an innominate contract, and the donor can either revoke the gift with the *condictio ob causam datorum*¹² or sue for the performance of the condition in the action *præscriptis verbis*.¹³

4. *The Form of Gifts.*

§ 467. 1. According to the ancient law the simple pact of gift was not actionable. To render a gift valid and operative by the concession of a claim

¹ fr. 9. § 3. D. 39. 5.

² The gift of another's thing founds only a title of usucapion: fr. 2. 3. D. 41. 6; fr. 13. pr. D. 39. 6.

³ fr. 9. pr. fr. 28. D. 39. 5.

⁴ fr. 2. § 2. fr. 33. § 3. D. 39. 5; Const. 22. 23. C. 4. 35.

⁵ fr. 17. fr. 23. pr. D. 9. 35; fr. 1. D. 2. 15. ⁶ fr. 5. § 13-15. D. 24. 1.

⁷ fr. 72. pr. D. 23. 3; fr. 12. D. 39. 5; fr. 39. D. 50. 16.

⁸ Savigny, Syst. § 159, Vol. 4, p. 134, seq.; Meyerfeld, Vol. 2, § 21.

⁹ fr. 1. pr. fr. 29. pr. D. 39. 5.

¹⁰ fr. 27. fr. 34. § 1. D. 39. 5; fr. 6. pr. fr. 7. D. 17. 1; fr. 12. §§ 2. 3. D. 26. 7; *Mahr*, Über der *donatio remuneratoria*, Munich, 1828; *Savigny*, p. 88, seq.; *Meyerfeld*, § 19.

¹¹ Const. 9. 22. C. 8. 54; Const. 8. C. 4. 64; Const. 1. C. 8. 55; Const. 2. 6. C. 4. 6; *Savigny*, p. 289, seq.; *Bergmann*, De naturæ donationum, Göttingen, 1808.

¹² See also § 469, *infra*. In one case he can also use the *rei vindicatio*: Const. 1. C. 8. 55.

¹³ The latter naturally ceases when the donor has no personal interest in the fulfillment of the condition. On the other hand, a third person to whom the gift should be restored can sue thereon in a *utilis* action: Const. 2. C. 6. 45; Const. 3. C. 8. 55.

it had to take the form of a stipulation. According to a *lex Cincia* (A. U. C. 550) gifts, excepting those to a near kinsman, could not exceed a certain measure.¹

2. In modern law many formalities for gifts were prescribed by imperial constitutions, and these prescripts underwent many changes.²

3. Justinian finally ordained that the simple pact of gift should be actionable, but a gift exceeding 500 *solidi* must be judicially confirmed. If this judicial confirmation be omitted, then the gift so far as it exceeds that sum, but only the excess, is invalid; and should it have been given, such excess can be reclaimed.³ There are some gifts that do not require such confirmation, even if they exceed that sum, which include particularly money gifts for the release of prisoners and the re-establishment of ruined houses,⁴ such gifts as the regent or regentess makes or which are made to them,⁵ and the gift on account of marriage (*donatio propter nuptias*);⁶ but remuneratory gifts require confirmation.⁷

5. *The Effect of Gifts between the Living.*

§ 468. The effect of a gift between the living, when it depends on something to be done for the donee, is that the donee can sue for its fulfillment, if the gift were made by stipulation, in the action *ex stipulatio*; in all other cases, in the *condictio ex Lege* 35. § ult. *C. de donationibus* (8. 54).⁸ How-

¹ Respecting the ancient law, particularly the *Lex Cincia*, see *Fragm. Vaticana*, § 263, § 302-311; *Rudorff*, *Diss. de Lege Cincia*, Berlin, 1825; *Serverans*, *Diss. ad Legem Cinciam*, Ghent, 1829; *Klinkhamer*, *Comm. de donationib. cap. 2*, Amsterdam, 1826; *Savigny*, *verm. Schriften*, Vol. 1, No. 12, where the above works, written before the discovery of the Vatican fragment, are printed with a supplement of 1849.

² On the modern law, see *Fragm. Vaticana*, § 249; *Const. 1. C. Th. 3. 5*; *Const. 1. C. Th. 8. 42*; *Const. 25-33. C. 8. 54*; *Savigny*, *Syst.* Vol. 4, p. 199, *seq.*; *Klinkhamer*, *supra*, p. 154, *seq.*

³ On the Justinian law, see § 2. I. 2. 7; *Const. 34-37. C. 8. 54*; *Novel 52. c. 2*; *Novel 162. c. 1*; *Savigny*, *supra*. On the gift of yearly rents so far as they exceed this sum, see *Const. 34. § 4. C. 8. 54*; and on the interpretation of this ordinance, see, particularly, *Savigny*, *supra*. However, gifts between husband and wife, when they exceed that sum, are subject to those formalities, unless the donor had expressly confirmed them in his last will: *Const. 25. C. 5. 16*; *Novel 127. c. 2*.

⁴ *Const. 36. pr. § 2. C. 8. 54*. But generally gifts for pious purposes must be confirmed: *Const. 19. C. 1. 2*.

⁵ *Const. 34. pr. C. 8. 54*; *Novel 52. c. 2*.

⁶ *Novel 119. c. 1*. At least the omitted confirmation does not damage the wife; but the husband may be damaged by it: *Novel 27. c. 2*.

⁷ The majority hold that these are not subject to confirmation, but see *Meyerfeld*, Vol. 1, § 19; *Savigny*, *System*, Vol. 4, p. 86, *seq.* The proper remuneratory gifts, however, should not be confounded with the cases in *fr. 27. fr. 34. § 1. D. 39. 5*.

⁸ § 2. I. 2. 7; *Const. 35. § ult. C. 8. 54*; *Novel 162. c. 1*. But the donee acquires the property of the thing given only by the delivery of it: *Const. 20. C. 2. 3. § 40. in fin. I. 2. 1*.

ever, the donor can only be condemned to the extent of his means (*in id, quod facere potest*), and is not liable to pay interest for delay.¹ He is not liable for eviction unless he agreed to be, or if he knowingly gave another's thing and thereby injured the donee.²

6. Causes for Revocation of Gifts.

§ 469. The gift between the living is generally irrevocable. This rule, however, has exceptions.

A. When the gift is so great that the birthright part of those who have a right to it has been diminished (*inofficiosa donatio*).³ This is to be determined according to the state of the property at the time of the gift. Such an inofficious gift may be rescinded at the instance of the person entitled to the birthright part, but not by the donor, and only so far as is requisite to secure to the complainant his birthright part.

B. The donor himself is authorized to revoke in the following cases:⁴

1. When the donee has been grossly ungrateful to the donor, which includes when he seeks to take his life; when he lays hands on him violently; when he craftily causes him a great loss of property; when he otherwise severely injures him, and when he does not perform the obligations undertaken at the making of the gift.⁵ In all these cases, however, only the donor, and not his heirs, is authorized to revoke, and he can only redemand the thing given from the donee by a personal action without its products received in the interim.⁶

2. When one at a time at which he has no children gives his whole property, or at least a considerable part of it, to those whom he emancipated, and afterwards has children.⁷

II. THE PACT OF PROMISING A *Dos* (*pactum de dote constituenda*).

§ 470. By the ancient Roman law quit could be instituted only for a promised *dos* when the promise was made by stipulation or by *dictio dotis*. But

¹ fr. 12. fr. 22. fr. 23. pr. § 3. D. 39. 5; fr. 19. § 1. fr. 30. 49. 50. D. 42. 1.

² Const. 2. C. 8. 45; Tr. 18. § 3. D. 39. 5. See fr. 62. D. 21. 1. If the promise be for a *genus* and the promisor give another's thing, this is no payment, and he is bound to perform something else for it. See fr. 46. fr. 45. §§ 1. 2. D. 30; fr. 38. § 3. fr. 72. §§ 5. 6. D. 46. 3; Glück, Vol. 20, p. 256, *seq.*

³ fr. 87. §§ 3. 4. D. 31. But particularly Cod. Theod. 2. 20; Cod. Just. 3. 29; Novel 92; *Cujas*, Paratitla in tit. C. de inoff. don. Observ. lib. 5. c. 14. Expos. Novel. ad Novel. 92; *Donellus*, Comm. jur. civ. Lib. 19, cap. 11; *Francke*, Das recht der Notherben, § 42-46; Glück, Comm. Vol. 7, § 550, Vol. 36, § 1421, g.

⁴ Cod. 8. 56; *Savigny*, System, Vol. 4, p. 224, *seq.*

⁵ Const. 10. C. 8. 56. Respecting several limitations of the right of revocation for ingratitude, see Const. 7. C. 8. 56.

⁶ *Vinnius*, Quæst. sel. Liber 2. C. 5. The intervening rights in a thing conceded to a third person do not cease of themselves.

⁷ Const. 8. C. 8. 56, and see Const. 5. C. 3. 29. The judicial usage extends this prescript to other persons: *Cremers*, De revocandis donationibus, Gröningen, 1817; *Savigny*, p. 229.

by the modern law the simple pact and the simple *dotis pollicitatio* are actionable.¹

III. UMPIRAGE (*compromissum*).²

§ 471. *Compromissum* (umpirage) is that convention whereby two or more persons mutually bind themselves to refer their legal dispute to the decision of a designated third person, who is termed umpire. The effect of the umpirage is that both parties must submit to the arbitrament (*arbitrium* or *laulum*) of the umpire. By the Roman law it was generally requisite that each party should give security to the other by a penal stipulation (*pœnæ stipulatio* or *compromissa pecunia*) for the performance of the umpire's arbitrament, on which could have been instituted an action *ex stipulatu* for the payment of the penalty when either party refused to perform the arbitrament.³ There were, however, already at the time of the classical jurists other means to secure obedience to the arbitrament.⁴ When there were no mutual penal stipulations and the parties by their signatures or by ten days silence assented to the umpire's arbitrament, Justinian granted the victorious defendant an exception and the victorious plaintiff an action *in factum*.⁵

III. Prætorian Pacts (*pacta prætoria*).

A. CONSTITUTUM DEBITI S. PECUNIÆ.

§ 472. Prætorian pacts (*pacta prætoria*) are those obligatory conventions to which the prætorian edict gave actionability.⁶ These include the *constituta pecunia* or the *constitutum*. This is a convention whereby one superadds a promise of something additional for the payment of an existing or expectant debt.⁷ When this debt is his own, then this convention is termed *constitutum debiti proprii*; but if it be the debt of another, then it is termed *constitutum debiti alieni*.⁸ With the Romans the first secured particularly the advantage

¹ By an ordinance of Theodosius II. and Valentinian III.: Const. 3. 4. C. Th. 3. 13; Const. 6. C. 5. 11; Const. 25. C. 4. 29. See *infra*, § 564.

² Dig. 4. 8; Cod. 2. 56. (see also X. 1. 43); Glück, Comm. Vol. 6, § 475; Puchta, Das Institut der Schiedsrichter, Erlangen, 1823; Jaspis, Diss. de arbitris, Leipsic, 1821.

³ fr. 2. fr. 11. § 1-4. fr. 13. § 1. fr. 38. D. 4. 8.

⁴ fr. 11. §§ 2. 3. fr. 13. § 1. fr. 27. § 7. D. 4. 8; Const. 5. pr. C. 2. 56.

⁵ Const. 5. C. 2. 56. He who will not abide by the arbitrament must formally notify in the first ten days either the opposite party or the judge. See Justinian's Const. 4. C. 2. 56, which already contained a part of that which was ordained in Const. 5, but at the same time particularly designates the case when the parties or the umpire have sworn what Justinian later, in Novel 82. c. 11, forbids. At the present day the simple convention is sufficient everywhere to require the performance of the arbitrament: Cap. 2. 9. 13. X. 1. 43.

⁶ § 1. I. 3. 13. (14); § 3. I. 4. 6.

⁷ §§ 8. 9. I. 4. 6; Dig. 13. 5; Cod. 4. 18; Donellus, Comm. ad tit. Cod. de const. pec., in his works, Vol. 7, p. 957; Glück, Comm. Vol. 13, § 849, seq.; Unterholzner, Schuldverh. Vol. 2, p. 838, seq.; Reinganum, De const. pecunia, Heidelberg, 1819.

⁸ fr. 5. § 2. D. 13. 5; Const. 1. C. 4. 18.

that when a non-actionable convention was constituted only an action *ex constituto* for its performance could be instituted. The latter was a kind of intercession (§ 451, *supra*). It had great similarity to the *fidejussio*, and was chiefly distinguished from it in that it was concluded without stipulation,¹ that it presumed an already existing principal debt and that it was not of so strictly accessorial nature as the *fidejussio*. For the latter reason the *constituent* could bind² himself for something other than the principal debt calls for;³ to an earlier, but not to a greater, payment; to payment at another place⁴ and to another creditor;⁵ and a *constitutum*⁶ for more than is due is not wholly invalid.⁷ Otherwise the *constitutum debiti alieni* has the same effect as the *fidejussio*, and the *constituents* have the same rights as the sureties have (§ 453, *supra*).⁸ The action arising from the *constitutio* is termed *constitutæ pecuniæ action*.⁹

B. RECEPTION OF THE THINGS OF A TRAVELLER.¹⁰

§ 473. An innkeeper, liverykeeper or shipowner who receives the things of a traveller in his inn, stable or ship, by himself or his servants, by the prætorian edict contracts a strict obligation to be liable for the eloignment, damage or destruction of such things. He is unconditionally bound for his own and his servants' acts and omissions, and for the positive acts of his passengers and guests, and for the acts of other persons. He is not liable for unavoidable casualty or damage caused by internal decay, nor for the acts of the passengers' and guests' servants, but he is liable for theft. The action that may be instituted against him is termed action *in factum de recepto*.¹¹

¹ § 9. I. 4. 6.

² fr. 1. § 5. D. 13. 5.

³ fr. 4. fr. 11. § 1. fr. 12. 13. 19. D. 13. 5.

⁴ fr. 5. pr. D. 13. 5.

⁵ fr. 5. § 2. D. 13. 5.

⁶ fr. 11. § 1. fr. 19. D. 13. 5; Const. 2. C. 4. 18.

⁷ See also fr. 18. §§ 1. 3. D. 13. 5.

⁸ Novel 4. cap. 1; Novel 136. præf.; Const. 3. C. 4. 18; Theophil. ad § 8. 9. I. 4. 6.

⁹ Paul, S. R. II. 2; § 8. I. 4. 6; Const. 2. C. 48; Theophil. ad h. l.; Const. 2. C. 4. 18. The prætorian edict applied to them only when the matter was concerning money or other fungible things, sometimes for a year only and with other limitations. On the other hand, it permitted, in the case of money-brokers, a *receptitia* action, which was not subject to any of these limitations. Justinian, by Const. 2. C. 4. 18, repealed the *receptitia* action and the above-mentioned limitations of the action *constitutæ pecuniæ*.

¹⁰ Dig. 4. 9. Glück, Comm. Vol. 6, § 485; Unterholzner, Schuldverh. Vol. 2, p. 732, *seq.*; Koch, Recht der Ford. Vol. 3, p. 286, *seq.*

¹¹ fr. 3. §§ 1. 5. D. 4. 9. Respecting its present application, see Wolters, Über die actio de recepto in Bezug auf Gastwirthe, Hamburg, 1804. Respecting their analogous application to freight-carriers because of things delivered to them for trans-

C. RECEPTION OF AN AWARD (*receptum arbitrii*).

§ 474. With umpirage (§ 471, *supra*) is connected the *receptum arbitrii*, or the agreement of disputing parties with the umpire whereby the latter promises to investigate the dispute and decide it (*recipit arbitrium*). By the prætorian law he can be held to the performance of this promise by the judicial authority and be subject to a pecuniary penalty.¹

D. THE PACT OF THE EXTRA-JUDICIAL OATH (*pactum de jurejurando extrajudiciali*).

§ 475. The pact of the extra-judicial oath consists in a convention between two persons to make the decision of their dispute depend on an extra-judicial oath which one of them shall swear.² If the deponent swear to a claim, then he can follow it with the prætorian action based on the oath, without it being necessary further to prove the claim.³ If, on the contrary, the deponent swear to a release of the claim of his antagonist, then he can protect himself against the action for it with the exception *jurisjurandi*.⁴ The release from the taking of the oath has equal effect as if taken.⁵ The refusal to take the oath annuls the convention.⁶

CHAPTER II.

OBLIGATIONS ARISING FROM WRONGS.⁷

I. IDEA.

§ 476. Every voluntary act of a person violating a penal law is termed a wrong, delict (*delictum*). The general consequence of a wrong is the obligation to pay the damages caused by it and to suffer the punishment prescribed by law.⁸ If a number jointly commit a wrong, then they are liable

port, which in principle already, because of fr. 25. § 7. D. 19. 2. (see fr. 14. § 17. D. 47. 2), must be permitted, see *Ferd. Mackeldey*, Diss. quatenus actio de recepto, Helmstadt, 1806; *Müller*, Über die recepto actio, Leipsic, 1835; *Funckhänel*, Über die recepto actio, Glauchau, 1836. Respecting the question, Are innkeepers legally bound to receive travellers? see fr. 1. § 1. D. 4. 9; fr. un. § ult. D. 47. 5.

¹ fr. 3. §§ 1. 2. fr. 9. §§ 3. 4. 5. fr. 10. fr. 11. pr. § 1. fr. 15. fr. 32. § 12. D. 48.

² Paul, sent. rec. II. 1; § 11. I. 4. 6; Dig. 12. 2; Cod. 4. 1; *Donellus*, ad tit. Dig. de jurejurando, cap. 3-9; *Glück*, Comm. Vol. 12, § 796; *Goecke*, Disp. de jurejurando, Berlin, 1826, p. 8-21; *Savigny*, System, Vol. 7, p. 53, seq.

³ § 11. I. 4. 6. See fr. 5. fr. 9. § 1. fr. 11. § 3. fr. 13. §§ 2. 5. fr. 28. § 10. D. 12. 2.

⁴ § 4. I. 4. 13; fr. 9. § 1. D. 12. 2.

⁵ fr. 6. fr. 9. § 1. D. 12. 2.

⁶ fr. 5. § 4. D. 12. 2.

⁷ *Gaius*, III. § 182, seq.; Inst. 4. 1; Dig. 47. 1; *Donellus*, Comm. jur. civ. Lib. 15, c. 23-30; *Bucher*, Recht der Forderungen, 2d ed. § 124-142; *Savigny*, Obl.-Recht, Vol. 2, § 82, seq.

⁸ *Kleinschrod*, Doctrina de reparatione damni delicto, Wirceb. 1798.

for the damages *in solidum* and without the right of invoking the benefit of division (*beneficium divisionis*), and without redress against their co-participants.¹ Each participant must suffer the punishment for himself.²

II. DIVISION OF WRONGS AND THE PENALTIES CONNECTED THEREWITH.

§ 477. By the Roman law the penalty consequent on a wrong is divided into public or private. Public penalties are those which the state has the right to inflict; private, those which the injured are authorized to demand. The private penalty which the Roman law generally inflicts is that the delinquent must pay the injured double, treble or quadruple the damages suffered.³ Wrongs which have private penalties as their consequences were termed by the Romans private wrongs (*privata delicta*).⁴ For those wrongs for which public penalties were imposed the process was termed *publicum iudicium*, when formerly by a *lex a questio perpetua* was instituted; where this was not done, but a public punishment of hanging was decreed, by the modern law the illegal act was termed an extraordinary crime (*extraordinarium crimen*).⁵ The doctrine of public punishment belongs to the criminal law; the doctrine of private punishment, on the contrary, as also that of compensation for damages, belongs to the private law and law of obligations. But therewith is the distinction that the action for damages not only descends to the heirs of the injured parties, but also against the heirs of the wrongdoers so far as they have been enriched by the wrong.⁶ But the action for a private penalty which may be instituted, though it generally descends to the heirs of the injured parties,⁷ cannot be instituted against the heirs of the wrongdoers,⁸ unless it had already been instituted against them while living; in such case it can be continued against the heirs of the wrongdoers.⁹ By the Roman law the private wrongs (*delictis privatis*) include theft, robbery, wrongful injury of honor and of reputation.¹⁰

¹ fr. 14. § 15. D. 4. 2; Const. 1. C. 4. 8.

² fr. 11. § 2. D. 9. 2; fr. 55. § 1. D. 26. 7; fr. 34. D. 47. 10.

³ §§ 18. 19. 21–23. I. 4. 6. See *supra*, § 209.

⁴ Rubr. Dig. 47. 1.

⁵ Inst. 4. 18; Dig. 47. 11; D. 48. 1; Savigny, Obl.-Recht, § 83.

⁶ fr. 38. 127. D. 50. 17; Const. un. C. 4. 17.

⁷ Gaius, IV. 112; § 1. I. 4. 12.

⁸ Gaius, IV. 112; fr. 111. § 1. D. 50. 17; fr. 1. pr. D. 47. 1.

⁹ fr. 33. D. 44. 7; fr. 164. D. 50. 17.

¹⁰ In Germany, however, an action in general can be instituted only for damages, and the Roman penal actions for private penalty rarely take place; because at the present day generally every criminal act is subject to a public penalty: Savigny, Obl.-R. § 84.

III. OF PRIVATE WRONGS IN PARTICULAR.¹

A. THEFT.

1. *Idea and Kinds.*

§ 478. Theft (*furtum*), in the sense of the Roman law,² is every fraudulent deprivation of movable things,³ with the design of acquiring an illegal advantage (*lucri animo*).⁴

1. It consists⁵ in an illegal appropriation of another's property either by taking possession of it, or when one who is in possession of property not as owner, but, *e. g.*, as pawnee or commodatary, designedly changes his former possession into possession as his own property by a unilateral act, *e. g.*, concealment, denial or embezzlement.⁶

2. When one who possesses a thing not as owner, but as pawnee, commodatary or depositary, uses it without authority.⁷

3. When the owner deprives another of his (the owner's) property, which the other had a right to possess, *e. g.*, as pawnee.⁸ Should the thief be detected in the theft and seized before he took them to the place where they were to have remained, at least for the same day, then the theft is a *furtum manifestum*, otherwise *furtum nec manifestum*.⁹

¹ In the following sections only the wrongs of freemen are spoken of. The terms *nozia* and *noza* relate chiefly to the wrongs of slaves. Such wrong creates no action if perpetrated against the master. The rule was *noza caput sequitur*. If the delinquent became free, then he could be sued. Formerly the master to whom the slave belonged at the time of the institution of the suit, as such could be sued. The judgment thereon proceeded for the alternative of the delivery of the slave *noze deditio* or payment of money. Such actions against the master were termed noxal actions. See thereon Gaius, IV. § 75-79; Inst. 4. 8; Dig. 9. 4; Cod. 3. 41; Glück, Comm. Vol. 10, § 712, *seq.*; Zimmern, System der Röm. Noxalklagen, Heidelberg, 1813. By the ancient law noxal actions might be instituted against the family father for the wrongs of the family son, but by the Justinian law the wrongdoers themselves must be sued: § ult. I. 4. 8.

² Gaius, III. § 183-208; Paul, II. 31; Inst. 4. 1; Dig. 47. 2; Cod. 6. 2; Donellus, Comm. jur. civ. Lib. c. 29; Hasse, Von der Culpa, § 81-91; Unterholzner, Schuldverh. Vol. 2, p. 675, *seq.*; Koch, Recht der Ford. Vol. 3, p. 955, *seq.*; Imhoff, De furtis ad leg. XII. tabb. Groningen, 1824; Luden, De furti notione sec. jus. Rom. Jena, 1831.

³ There cannot be a theft of an immovable thing: Gaius, II. § 51; § 7. I. 2. 6; fr. 25. pr. D. 47. 2; fr. 38. D. 41. 3.

⁴ § 1. I. 4. 1; fr. 1. §§ 2. 3. D. 47. 2. See fr. 52. § 16. D. 47. 2; fr. 22. § 7. D. 17. 1; Const. 7. C. 6. 2; fr. 39. D. 47. 2.

⁵ That the idea of *furtum* has so great an extent as occurs in the text, or, in other words, that this wrong can be committed in the three ways mentioned, the legal definition of Paul shows briefly in fr. 1. § 3. D. 47. 2. See § 1. I. 4. 1.

⁶ fr. 33. fr. 46. § 6. fr. 52. § 7. fr. 59. fr. 67. pr. fr. 71. pr. fr. 73. D. 47. 2.

⁷ § 6. I. 4. 1; fr. 40. fr. 54. pr. fr. 76. pr. D. 47. 2; fr. 16. D. 13. 1.

⁸ Gaius, III. § 200; § 10. I. 4. 1; fr. 15. §§ 1. 2. fr. 19. §§ 5. 6. fr. 20. § 1. fr. 53. § 4. fr. 59. D. 47. 2; fr. 49. D. 41. 3.

⁹ § 3. I. 4. 1; fr. 2. fr. 8. fr. 21. pr. fr. 35. D. 47. 2.

2. *Obligations arising from Theft.*

§ 479. The legal effects of theft are the following:¹

1. The thief is bound to return to the owner the thing with all its accessories, and if it no longer exist to pay the highest price that it bore since it was taken.²

2. The thief is bound absolutely for all damages, even casual.³ The owner of the stolen thing for the enforcement of both of these obligations can sue the thief and his heirs, even if they were not enriched by the theft, but not the receiver of the thing and accomplice,⁴ in the *condictio ex causa furtiva* or *condictio furtiva*.⁵

3. By the Roman law every one who had a legal interest that the thing should not be abstracted⁶ could claim from the thief, but not from his heirs, as a private penalty in the action *furti*, which was a penal action,⁷ when the theft was *manifestum*, the quadruple value of the thing; when, on the contrary, it was *nec manifestum*, the double value. The accomplice and the conscious receiver of the theft were in either case bound for the payment of double the value.⁸

3. *Of the Amotio Rerum.*

§ 480. When betrothed or husband and wife steal—

1. If the theft occurred before marriage, then the *condictio furtiva* is applicable, as also if it occurred during marriage, but not the action *furti*.⁹

2. But when the theft first occurred during marriage it is termed *amotio rerum*, and founds the action *rerum amotarum*,¹⁰ which may be instituted if it

¹ That the owner of the thing abstracted can claim it from every one, even the innocent possessor of it, without compensation is of right: § 19. I. 4. 1; Const. 2. C. 6. 2. This is not a consequence of the theft, but of the property.

² fr. 8. pr. §§ 1. 2. D. 13. 1. See fr. 67. § 2. D. 47. 2; fr. 13. D. 13. 1.

³ See *supra*, § 378, notes 5 and 6.

⁴ fr. 5. fr. 7. § 2. fr. 9. fr. 10. § 1. D. 13. 1; §§ 4. 11. 12. 14. 19. I. 4. 1; fr. 6. D. 13. 1.

⁵ Dig. 13. 1; Cod. 4. 8; Glück, *Comm.* Vol. 13, § 837; Krug, *Selecta de condictioe furtiva capita*, Leipzig, 1831; Unterholzner, *Schuldverh.* Vol. 2, p. 58, *seq.*; Koch, *supra*. The *condictio ex causa furtiva* is only for the owner of the thing: fr. 1. 11. D. 13. 1; fr. 14. § 16. in fin. D. 47. 2; fr. 12. § 5. D. 7. 1. The pawnee has only a *condictio incerti* and the action *furti*. See fr. 12. § 2. D. 13. 1.

⁶ § 13-17. I. 4. 1; fr. 10-12. fr. 14. §§ 10. 16. fr. 46. §§ 1. 4. fr. 71. fr. 85. D. 47. 2.

⁷ § 5. I. 4. 1; § 18. I. 4. 6; fr. 50. pr. D. 47. 2. The punishment of the *furti manifesti*, according to the twelve tables, was, that the thief was whipped and assigned to the plaintiff. The praetorian edict gave instead of this the quadruple penalty: Gaius, III. § 189; § 5. I. 4. 1. As on a *furtum manifestum*, according to the twelve tables, a plaint could be instituted also against those with whom the stolen things were found by a legal search: Gaius, III. §§ 183. 192-194; Gellius, XI. c. ult.; XVI. c. 10; Festus v. lance et licio; Lex Rom. Burgund. tit. XII.; § 4. I. 4. 1.

⁸ § 4. in fin. § 11. I. 4. 1; fr. 6. D. 13. 1; fr. 34. fr. 50. § 3. fr. 52. fr. 54. § 4. D. 47. 2.

⁹ fr. 3. § 2. D. 25. 2.

¹⁰ Dig. 25. 2; Cod. 5. 21; Donellus, *Comm. jur. civ.* Lib. 15, c. 29; Glück, *Comm.* Vol. 27, § 1284.

occurred in expectation of a divorce,¹ which actually followed.² It is adapted for the restitution of the thing with all its accessories or for damages.³ The action *furti* cannot be instituted between husband and wife.⁴

B. ROBBERY.

1. *Idea.*

§ 481. Robbery (*rapina*)⁵ consists in the forcible taking of another's movable property with the view to enrich one's self.⁶ It can only be exercised on another's property, and presumes that the robber knew that the property belonged to another.⁷ Hence he who takes from another by force a thing which belongs to himself or which he so believes does not commit robbery, but simply violence and self-redress:⁸ the consequences and penalties of both are various.

2. *Obligations arising from Robbery.*

§ 482. Robbery imposes on the robber the obligation to return the thing and to answer for every damage, even casual.⁹ By the Roman law the person robbed and every one who has an interest that the property shall not be stolen¹⁰ can sue the robber as a *fur non manifestus* in the action *furti* for the double value, or in the prætorian action *vi bonorum raptorum* for the quadruple value, but in which the triple value is regarded as a penalty and the remainder as the single value of the stolen thing itself.¹¹ After the expiration

¹ fr. 6. § 3. fr. 17. pr. D. 25. 2.

² fr. 1. fr. 30. D. 25. 2. It is also permissible as an *utilis* action when the theft occurred in the expectation of the death of the loser, who recovered his health: fr. 21. pr. D. 25. 2. Another case in which it may be instituted during the marriage is in Const. 22. § 4. C. 6. 2.

³ fr. 1. fr. 3. § 3. fr. 6. § 4. fr. 17. § 2. fr. 21. § ult. D. 25. 2; Const. 3. C. 5. 21.

⁴ fr. 3. § 2. D. 25. 2.

⁵ Gaius, III. § 209; IV. § 8; Inst. IV. 2; Dig. XLVII. 8; Cod. IX. 33. See Dig. XLIII. 16; Cod. VIII. 4. and 5; *Donellus*, Comm. jur. civ. Lib. 15, c. 30.

⁶ fr. 3. § 5. D. 47. 9. Immovables cannot be the objects of robbery: Const. 1. C. 9. 33.

⁷ § 1. I. 4. 2; fr. 2. § 18. D. 47. 8.

⁸ fr. 2. § 18. cit. Violence (*crimen vis*) may, however, be committed with regard to movables as well as immovables by an invasion (§ 483, *infra*).

⁹ fr. 8. § 1. D. 13. 1.

¹⁰ § 2. I. 4. 2.

¹¹ Inst. 4. 2; D. 47. 8; Cod. 9. 33; *Savigny*, Verm. Schriften, Vol. 3, No. 30; *Breitenbach*, Das Verbrechen des Raubes, Munich, 1839; *Keller*, Semestr. ad M. Tull. Ciceron. lib. III. Tur. 1851. This action may also be instituted for violent injury to movables or immovables: fr. 2. pr. §§ 9. 12. D. 47. 8. It was introduced during the civil war, and was originally designated as peculiarly adapted for violence at that time. As well because of injury as of plundering, it was originally instituted only when the deed was done by an armed body (*hominibus armatis coactisque*), without it depending on the application of force. Afterwards in peaceful times the matter of actual damages became obsolete, as the appellation of the action shows. See also Inst. 4. 2; fr. 1. § 14–16. D. 47. 8; fr. 12. § 1. D. 39. 4; fr. 1. pr. D. 47. 6.

of a year this action could be instituted for the single value only.¹ Against the heirs of the robbers always only the *condictio furtiva* could be instituted.²

3. Penalties for Unlawful Self-redress and Violence.

§ 483. Self-redress,³ when it is not a defence against violent and unlawful seizure by another,⁴ is not only forbidden, but also punishable. The Roman law contains the following provisions thereon:

1. When a creditor himself satisfies his claims arbitrarily without the assistance of the judge, though without personal violence to the debtor, he is not only bound for restitution, but he also loses his claim as a penalty.⁵

2. When one claiming to be the owner of a movable or immovable thing violently deprives the possessor of it, if it be his property he loses it, and it passes to the former possessor as a penalty; if it be not his property, then he must not only return the thing, but as a penalty also pay the value thereof, and even without distinguishing whether he acted *bona* or *mala fide*.⁶ The bailee of another's property and he also who possesses such a bailment shall suffer the same penalty if they without cause shall refuse to return the same after the termination of the contract or after the same is redemanded, and persist in this refusal till the definitive judgment.⁷

C. DAMAGES INFLICTED WRONGFULLY (*damnum injuria datum*).

1. Idea.

§ 484. *Damnum injuria datum* is the term given by the Roman law to every injury which a freeman⁸ commits on another's property by an illegal act (*culpa injuria*), whether it occurred intentionally or by error, or whether it was great or trivial.⁹ But an illegal injury, caused by omission or inaction,

¹ pr. I. 4. 2. See fr. 1. pr. D. 47. 8.

² fr. 2. § 27. D. 47. 8.

³ *Donellus*, Comm. jur. civ. Lib. 17, c. 2; *Galvanus*, De usufructu, c. 40.

⁴ Such self-redress is permitted not only against seizure of the person and against seizure of things from their possessors but also against the retaking of that on the spot which one lost by violence: fr. 4. pr. fr. 5. fr. 45. § 2. D. 9. 2; fr. 3. § 9. fr. 17. D. 43. 16; Const. 1. C. 8. 4; Const. 4. C. 9. 16. Only there dare not be more force used than is requisite to ward off the seizer: fr. 5. pr. D. 9. 2; Const. 1. C. 8. 4.

⁵ fr. 12. § 2. fr. 13. D. 4. 2; fr. 7. D. 48. 7. Respecting the interpretation of fr. 50. D. 19. 1, see *Vangerow*, § 133.

⁶ Const. 3. C. Th. 4. 22; Const. 7. C. 8. 4; § 1. I. 4. 2; § 6. I. 4. 15. Respecting the actions for the delivery of the thing permitted here, see *Savigny*, Vom Besitz, § 40; *Vangerow*, § 690, Rem. 2; *J. A. Fritz*, Resp. ad quæstionem, quam actionem, Friburg, Brig. 1828.

⁷ Const. 10. C. 8. 4; Const. 34. C. 4. 65. For other penalties for self-redress in particular cases, see Novel 52. c. 1; Novel 60. pr. c. 1. 2; Novel 134. c. 7. The penalties mentioned in the text were expressly approved by the canon law: cap. 18. de prob. in Cto (3. 4); *Savigny*, Obl.-R. § 84.

⁸ The damages caused by a slave are termed *noxia*, and the damages caused by an animal are termed *pauperies*: § 1. I. 4. 8; pr. I. 4. 9.

⁹ fr. 44. pr. D. 9. 2.

is not comprehended in the idea of *damnum injuria datum*,¹ for this inaction can be illegal only in consequence of an existing obligatorial relation (§ 374, *supra*). Hence an action never arises from a wrong, but always from a relation growing out of a contract. This has an exception when an omission caused the damages to arise out of a preceding act.²

2. *Lex Aquilia*.

§ 485. The *Lex Aquilia*³ related particularly to damages inflicted wrongfully (*damnum injuria datum*);⁴ by this law the wrongdoer could be held liable for indemnification and for a private penalty,⁵ and in several cases, when he unlawfully killed the slave or the cattle of another, he could be held for the highest value that the slave or animal bore in the last year counted back from the time of the death;⁶ in all other cases, for the highest value that the thing damaged or destroyed bore in the last thirty days.⁷ When the accused falsely denied the injury he became bound for double compensation.⁸

3. *Of the Action by the Aquilian Law (actio Legis Aquiliæ).*

§ 486. The action by the Aquilian law was originally very limited.

1. It could be instituted only as a direct action when the body was injured by the exercise of corporeal power (*corpore corpori*), and even in this case only the owner of the destroyed or injured property could immediately sue by the Aquilian law for damages and penalty.⁹ Subsequently both limitations ceased. The action as *utilis* action was permitted when the body was injured (*corpori*), but not by corporeal act (*corpore*), and a general action (*in factum*)¹⁰ for compensation was permitted in the case when neither the person of the wrongdoer committed the damages, nor the person of the injured object was hurt (*nec corpore, nec corpori*). The action was not limited to the owner of the damaged property, but it was allowed to every one

¹ This is also expressly said in fr. 13. § 2. D. 7. 1.

² fr. 8. pr. fr. 27. § 9. fr. 44. § 1. fr. 45. pr. D. 9. 2.

³ A plebiscit completed at the time of the third departure of the plebeians; hence in the year U. C. 467: Theophil., ad § 15. I. 4. 3; Schol. ad Basil. LX. 3. 1. It repeals all previous prescripts respecting this wrong: fr. 1. pr. D. 9. 2.

⁴ Gaius, III. § 210; Inst. 4. 3; Dig. 9. 2; Cod. 3. 35; Coll. leg. Mosaic. 12. 7; Donellus, Comm. jur. civ. Lib. 15, c. 26; Noodt, ad Leg. Aquiliam, in his works, T. 1, p. 173; Cannegieter, De lege Aquilia, Groningen, 1821; Glück, Comm. Vol. 10, § 698-705; Unterholzner, Schuldverh. Vol. 2, p. 690, *seq.*; Koch, Recht der Ford. Vol. 3, p. 81, *seq.* See the writers on *culpa*, cited in notes to § 373, *supra*.

⁵ In which the loss suffered was also computed: § 10. I. 4. 3; fr. 21. § 2. fr. 22. fr. 23. pr. fr. 37. § 1. D. 9. 2.

⁶ pr. § 1. I. 4. 3; fr. 2. D. 9. 2.

⁷ § 13-15. I. 4. 3; fr. 27. § 5. fr. 29. § 8. D. 9. 2.

⁸ fr. 2. § 1. fr. 23. § 10. D. 9. 2; Gaius, III. § 216.

⁹ § 16. I. 4. 3; fr. 2. pr. fr. 27. § 5. D. 9. 2; fr. 11. §§ 6. 9. D. 9. 2; Hasse, Von der Culpa, 2d ed. p. 7-72.

¹⁰ § 16. I. 4. 3. fr. 33. § 1. D. 9. 2. See fr. 11. D. 19. 5.

utiliter who, because of a real right, had an interest that the property should not be damaged.¹

2. The action *Legis Aquilæ* is paramountly indispensable for the case when one by an illegal act inflicts damage on another's property, in regard to which he does not stand in any conventional relation or in other obligatorial relation with him. In like manner it is indispensable when one by such an act, in consequence of the lack of diligence (*levis culpa*), inflicts damages to property in regard to which, though he stands in conventional or similar relations, but yet they are such relations by virtue whereof he is liable only for intentional wrong (*dolus*) and gross neglect (*lata culpa*), as, e. g., the deposites.² If injurious damages be produced (*damnum injuria datum*) by an act for which one is liable *ex contractu* or by preceding obligatorial relations, then the action *Legis Aquilæ* competes in such a manner with the actions on these relations that the injured party has the election which of these actions he will institute.³ If, on the contrary, damage be done by wrongful omission, then the action on the contract only is instituted.

D. INJURIA.

1. Idea.

§ 487. *Injuria*, in its wide sense, signifies in the Roman law all that is done contrary to law, *quod non jure fit*.⁴ In its narrow sense, and in its especial relation to a person's honor, it signifies every act whereby the honor and good reputation of a man is intentionally injured (*animo injuriandi*).⁵

¹ fr. 11. § 10. fr. 17. pr. D. 9. 2. See also fr. 12. fr. 30. § 1. D. 9. 2; fr. 17. § 3. D. 7. 1. He who on the contrary has only a personal right in the damaged thing cannot institute the action *Legis Aquilæ*, fr. 11. § 9. D. 9. 2; but if that right were directed to the acquisition of the thing, the action of the owner can be ceded to him: fr. 13. § 12. D. 16. 1. Because of the pecuniary disadvantage which the injury to the body of a freeman draws after it, an *utilis Aquilæ* action is given when the injured person is *sui juris* to him and when he is a family son (*filius familias*) to the possessor of the paternal power (*patris potestas*): fr. 5. § ult. fr. 6. fr. 7. pr. fr. 13. pr. D. 9. 2: Glück, Comm. Vol. 10, p. 374.

² In this case there cannot be an action on the contract, but there may be the action *ex Lege Aquila*. However, many writers, and particularly nearly all the ancient ones, hold that this action also is not permissible. See the citations in Glück, Vol. 10, p. 310, *seq.*; and among the modern writers, Unterholzner, p. 698. But see *contra* especially Glück, *supra*; Haase, Von der Culpa, § 36, *seq.*

³ However, the one action is not lost by the institution of the other, nor by its success, but because satisfaction was obtained by it; and even in this case one action may be instituted for what has not been secured by an action that had already been instituted: fr. 7. § 8. fr. 18. D. 9. 2; fr. 7. § 1. D. 13. 6; fr. 34. § ult. D. 44. 7. Respecting the close of the latter passage, see Nariny, System, Vol. 5, p. 229, *seq.* and the citations there.

⁴ pr. l. 1. § 2. l. 4. 3; fr. 3. fr. 5. § 1. D. 9. 2; fr. 1. pr. D. 47. 10.

⁵ Gaius, III. § 220; Paul, 5. 4; Coll. leg. Mos. tit. 2; Inst. 4. 4. Dig. 47. 10; Cod. 9. 35. Donellus, Comm. jur. civ. Lib. 15, c. 24; Ad. Diet. Weber, Über Injurien und Schmähschriften, 4th ed. Leipsic, 1820; Zimmerman, De injuriis ex jure Rom., Berlin, 1835.

2. *Kinds of Injuria.*

§ 488. The honor of a person may be injured as well by words either spoken or written as by any other act. In the former case the injured reputation is a verbal, in the latter a real injury,¹ and the one like the other may, according to its extent, in which regard is always to be had to the place, time and the person, be trivial (*injuria levis*) or severe (*injuria atrox*).²

3. *Effect of Injuria.*

§ 489. The effect of wrong consists—

1. That according to the prætorian law the injured person can estimate the wrong suffered in money, and he is authorized to claim from the wrongdoer in the action *injuriarum æstimatoria* the sum which the judge according to a just measure considers as compensation and private satisfaction, which action, however, ceases by prescription in one year.³

2. And according to the *Lex Cornelia*, if the wrong consist in beating or in the forcing into a strange dwelling, an action for the same result may be instituted⁴ which as a civil action belongs to the *perpetuæ actiones*.⁵

CHAPTER III.

OBLIGATIONS WHICH ARISE FROM VARIOUS CAUSES.

GENERAL VIEW.

§ 490. Among the obligations which arise neither from contracts nor from wrongs, the usual sources of origin, but from various other causes (*proprio quodam jure ex variis causarum figuris*), are such as originate from quasi contracts (*quasi ex contractu*) and such as originate from quasi wrongs (*quasi ex delicto s. maleficio*); but there are also many which are produced in other ways.

¹ § 1. I. 4. 4. fr. 1. § 1. D. 47. 10.

² § 9. I. 4. 4; fr. 7. §§ 7. 8. D. 47. 10.

³ By the twelve tables the wrongdoer generally had to pay to the injured person 25 *asses* as a penalty; but when a bone was broken or hurt 300 or 150 *asses*, according as the injured person was a freeman or a slave; and when a limb was broken then he would be punished with the like injury (*talio*), when they did not effect an amicable arrangement: Gaius, III. § 223; Gellius, XX. 1. As these provisions no longer accorded with the estate of many Romans, the prætor allowed an action according to the above-mentioned rules: Gaius, III. § 224; Coll. II. 5. 6; § 7. I. 4. 4.

⁴ The *Lex Cornelia* permitted in these cases a penal action, but gave the injured person the election between it and an action for a private penalty: fr. 5. D. 47. 10. At a later period every injured person could sue for the public penalty, if he preferred it: § 10. I. 4. 4; fr. ult. D. 47. 10.

⁵ § 8. I. 4. 4. comp. with fr. 37. § 1. D. 47. 10.

TITLE FIRST.

OBLIGATIONS FROM QUASI CONTRACTS (*obligationes quasi ex contractu*).

I. IDEA.

§ 491. Often persons who have not contracted with each other, under a certain state of facts are regarded by the Roman law as if they had actually concluded a convention between themselves (*quasi contraxissent*). The legal relation which then takes place between these persons, which has always a similarity to a contract obligation, is therefore termed *obligatio, quæ quasi ex contractu oritur*.¹ Such a relation arises from the conducting of affairs without authority (*negotia gesta, negotiorum gestio*); from the management of property that is in common, when the community arose from casualty (*communio incidens*); from the payment of what was not due (*solutio indebiti*); from the tutor and curatorship, and from taking possession of an inheritance.²

A. THE MANAGER OF ANOTHER'S BUSINESS (*negotia gesta*).³

1. Idea.

§ 492. The Roman term *negotia gesta*, like the present term *negotiorum gestio*, designates the management of another's business without his authority and knowledge;⁴ from which arises between him who manages the business of another (*negotiorum gestor*) and the latter (*dominus negotiorum rei s. gestæ*) an obligation similar to the obligation arising between the mandator and his mandatary, and in which generally the same principles apply.

2. Conditions for the Management of Another's Business.

§ 493. The *negotiorum gestio* always presumes the case of another's affairs which one manages without authority and without being authorized thereto.

¹ Inst. 3. 27. (28); *Donellus*, Comm. jur. civ. Lib. 15, c. 14-23; *Hübner*, Diss. de natura obligationum, Leipzig, 1802; *Weber*, Von der nat. Verb. § 9; *Bucher*, Recht der Ford. § 144-151; *Heilbronn*, De natura obligationis, Utrecht, 1827.

² *Tigerström*, Rom. Dotalrecht, Vol. 1, p. 198, also includes the constitution of the *dos*. But this, as also the legal relations between guardian and ward founded on guardianship and on the taking possession of an inheritance between the heirs on one side and the legatees on the other, will be further treated in §§ 520, 602, 686, *infra*, hence there remain yet to be considered only the first three legal relations.

³ Paul, l. 4; § 1. l. 3. 27. (28); Dig. 3. 5; Cod. 2. 19; *Donellus*, Comm. jur. civ. Lib. 15, c. 15-17; *Gluck*, Comm. Vol. 5, § 415-426; *Kock*, Recht der Ford. Vol. 3, p. 492. *seq.*; *Ruhstrat*, zur Lehre von der negotior. gestio, Oldenburg, 1858; *Chambon*, Die negotiorum gestio, Leipzig, 1848; *Dankwardt*, Die negotior. gestio, Rost. 1855; *Köllner*, Grundzüge der obligatio negotior. gestor, Göttingen, 1856; *Aarons*, Beiträge zur Lehre von der negotior. gestor. 1st part, Schwerin, 1860.

⁴ *Thibaut*, Civil Abh. No. 20; *Bussé*, De ratihab. Leipsic, 1834.

This embraces the case of a business manager who is able to bind the business owner in the contracting of debts. But in order to bind the latter it is requisite¹—

1. That the manager had in view the owner's benefit and not his own.²

2. That he further had in view to bind the owner.³

3. That by the conducting of the business a want was satisfied; as when the owner is dead or was not in a condition to manage the business himself, and that the business which was managed was necessary to avoid damages,⁴ or to keep the administration of the property in its course;⁵ so long as the manager remains within these bounds⁶ and manages the business well, he does not lose any part of his claims because the result has failed through casualty;⁷ and

4. That the owner has not expressly, either in writing or before witnesses, forbidden the management of the business.⁸ Subject to these provisions each one whose business was managed will be bound by the management, even if he could not bind himself in his own person.⁹

3. *The Effect of the Management of Another's Business.*

§ 494. By the management of the business the business manager becomes bound—

1. To conduct the business properly to an end which he undertook without authority, even if the owner should die during the time, otherwise he must compensate the damages and lose his claim for indemnity.¹⁰

2. He is bound for *diligentia*,¹¹ and hence in general is also bound to pay

¹ fr. 6. § 4. D. 3. 5. See fr. 6. pr. § 9. fr. 45. § 2. D. 3. 5.

² Otherwise the business manager can claim indemnity only to the extent that the owner has been enriched by the business: fr. 6. § 3. D. 3. 5.

³ fr. 27. § 1. fr. 44. D. 3. 5; Const. 11. C. 2. 19.

⁴ § 1. I. 3. 26. (27); fr. 1. D. 3. 5; fr. 5. pr. D. 44. 7.

⁵ Respecting such cases see, *e. g.*, fr. 6. § 12. fr. 8. pr. fr. 11. fr. 16. fr. 19. §§ 3. 5. fr. 21. § 2. fr. 23. fr. 31. § 6. fr. 35. 38. D. 3. 5.

⁶ Otherwise the owner is only bound to him to the extent that he has been enriched by the business: fr. 11. 43. D. 3. 5; fr. 5. pr. D. 15. 3.

⁷ fr. 10. § 1. fr. 22. 27. pr. D. 3. 5.

⁸ fr. 8. § 3. D. 3. 5; fr. 40. D. 17. 1; Const. 24. C. 2. 19.

⁹ Such one is only bound to the extent that he has been enriched: fr. 3. § 5. fr. 6. pr. fr. 37. pr. D. 3. 5.

¹⁰ fr. 17. § 3. D. 13. 6.; fr. 21. § 2. D. 3. 5; Const. 20. C. 2. 19.

¹¹ § 1. I. 3. 27. (28); fr. 23. D. 50. 17; fr. 32. pr. D. 3. 5; fr. 25. § 16. D. 10. 2; Const. 20. C. 2. 19; *Hasse*, Von der Culpa, § 99. Yet there are cases where he is bound only for intentional wrong (*dolum*) and gross neglect (*culpam latam*), and in other cases where he is liable even for casualty (*casum*). The former is the case where one takes another's property which otherwise would have been irrecoverably lost: fr. 3. § 9. D. 3. 5; the latter when he has undertaken a business for another which that other would not have entered into, fr. 11. D. 3. 5, or if he undertake the business of another against his express prohibition: fr. 8. § 3. D. 3. 5; Const. 24. C. 2. 19.

interest for the money involved in the business which he might have drawn from it.¹

3. He must render an account of his management, and must deliver to the owner everything which he by the business acquired for him.² For the enforcement of these obligations the owner can sue him in the *directa negotiorum gestorum* action.³ On the other hand, the owner is bound to repay to the manager—

1. All costs and expenses which he paid in the conducting of the business, together with interest from the time of payment.⁴

2. The owner must also release him from all obligations which the latter undertook for the owner.⁵ The action for the business manager against the business owner is termed *contraria negotiorum gestorum* action.⁶

4. *Funeraria Action.*⁷

§ 495. A particular kind of the management of another's business is the burial of the dead for which another is bound, notwithstanding he did not authorize the burial. He who undertakes such a charge can claim the money expended thereon in the *funeraria* action from him whose duty it was to bury the deceased;⁸ provided—

1. That it was not his intention to give it.⁹

2. That the burial was in accordance with the deceased's station; hence not too costly and not too mean.¹⁰

3. That no other action was at his command.¹¹ The action has the particular right of preference that when there is a competition of creditors respecting the deceased's property the burial expenses must be paid before all other debts,¹² and deviating from the usual *contraria negotiorum gestorum* action, it may be instituted when he on whom the duty of burial lay forbade it to him who made the burial.¹³

¹ fr. 19. § 4. D. 3. 5. See fr. 37. § 1. D. 3. 5; Const. 24. C. 4. 32. If he employed moneys for his own benefit which belonged to the owner he must pay six per centum interest: fr. 38. D. 3. 5. If he lent moneys insecurely, then he is liable for the principal and the usual interest: fr. 37. § 1. D. 3. 5.

² § 1. I. 3. 27. (28); fr. 2. D. 3. 5.

³ § 1. I. 3. 27. (28).

⁴ fr. 45. D. 3. 5. See fr. 2. fr. 19. § 4. fr. 37. D. 3. 5; Const. 18. C. 2. 19.

⁵ fr. 2. D. 3. 5.

⁶ § 1. I. 3. 27. (28).

⁷ Dig. 11. 7; Glück, Comm. Vol. 11, § 766; Dietzel, De actione funeraria, Leipsic, 1853.

⁸ fr. 12. § 2. D. 11. 7. See fr. 14. §§ 6. 12. 13. D. 11. 7; and, respecting the obligation to bear the expenses of burial, fr. 12. § 4. fr. 16–23. fr. 28. fr. 31. pr. D. 11. 7.

⁹ fr. 14. § 7. D. 11. 7; fr. 27. § 1. fr. 44. D. 3. 5; Const. 11. C. 2. 19.

¹⁰ fr. 12. § 5. fr. 14. §§ 5. 6. 10. D. 11. 7.

¹¹ fr. 14. § 12. D. 11. 7.

¹² fr. 14. § 1. fr. 45. D. Ibid.; Const. 22. § 9. C. 6. 30; Paul, sent. rec. Lib. 1. tit. 21. § 15. See *infra*, § 526.

¹³ fr. 14. § 13–17. D. 11. 7.

B. COMMUNITY AND BOUNDARY DISPUTES.

1. *Introduction.*

§ 496. Every community, be its object joint property (§§ 268 and 296, *supra*) or a real right in another's property, or be it united by a convention, a partnership contract, or if it casually originated without such union (*communio*¹ *inculens*), creates certain obligatorial relations among the associates (§ 497, *infra*), to enforce which the proper actions for partition are established (§ 499, *infra*). These relations are very similar to those which arise between boundary neighbors when the boundaries of their abutting grounds have become confused or at least disputed (§ 498, *infra*); hence these actions for fixing boundaries in such cases are included in the actions for partition in their wide sense (§ 499, *infra*).

2. *Obligations arising from the Proper Community.*²

§ 497. From a community arise the following obligations :

1. Each associate, before aught else is done, may propose partition from the others.³

2. The associate who managed the object of the community is bound to render an account of his management and divide proportionally with the others what he acquired by it.⁴ He is liable for such diligence as he employs in his own affairs.⁵ On the other hand, each of the other associates, in proportion to his interest, must reimburse the cost and expenditures which he applied to the common inheritance or property;⁶ and as this claim is not founded on the will of the obliged, but arises out of the money expended on the thing (*versio in rem, actio ex re venit*), hence the action may also be instituted against such associates as cannot bind themselves by their will, such as pupils and the insane.⁷

3. *Obligations in Disputes as to Boundaries.*⁸

§ 498. In disputes as to boundaries each of the interested parties can sue the other for an adjustment of boundaries. Each must account to the other for the benefits and products taken, so far as he should restore these to the

¹ The occasion for this expression was given by fr. 16. D. 10. 2. and fr. 31. D. 17. 2.

² §§ 3. 4. I. 3. 27. (28); Dig. 10. 2. and 3; Cod. 3. 36-38; Glück, Comm. Vol. 11, § 725-740; Unterholzner, Schuldverh. Vol. 2, p. 393, *seq.*; Koch, Recht der Ford. Vol. 3, p. 551, *seq.*; Vogt, Zur Lehre v. der a. comm. divid. Berne, 1842; Molitor, Les obligations, T. 2, p. 337, *seq.* See § 492, note 3.

³ See § 499, *infra*, note 2.

⁴ fr. 19. D. 10. 2. See fr. 6. § 2. D. 10. 3.

⁵ fr. 25. § 16. D. 10. 2; fr. 20. D. 10. 3.

⁶ Const. 18. § 1. C. 3. 36; fr. 18. § 3. D. 10. 2; fr. 4. § 3. fr. 14. § 1. fr. 29. pr. D. 10. 3.

⁷ fr. 46. D. 44. 7.

⁸ Dig. 10. 1; Cod. 3. 39; Glück, Comm. Vol. 10, § 714; C. Seveloh, Über Gränzrevision u. Gränzberichtigung, Fulda, 1808.

other, and to pay the damages caused by his wrong (*culpa*), but against which the other side is authorized to deduct the charges which were expended on the property for the claimant's benefit or to demand reimbursement therefor.¹

4. Actions for Division of Boundaries.

§ 499. The proper actions for division (*judicia divisoria*) proceed primarily for the division of an object in common and also for the other performances for which the interested parties became bound to each other by the community. The first of these objects can be attained only by the action for division.² For the attainment of the second object the partnership action (*pro socio*) generally serves.³ But when this action cannot be instituted, as in the case of the incidental community (*communio incidens*), it may be said that the action for division in some measure replaces the action on the partnership contract, and only in this relation the Romans say, that by the action for division obligations are rendered effectual that arose *quasi ex contractu*.⁴ The actions for division are purely personal actions (§ 208, *supra*, note 8), and both parties are plaintiffs and defendants (*duplicia judicia*) (§ 206, *supra*, note 5). These include—

1. The judgment or the action *familix erciscundæ*, which is for the division of a common inheritance and for the performance of the obligations mentioned in § 497, *supra*.⁵

2. The judgment or the action *communi dividundo*, which is for the division of any other community and for the performance of the obligations specified in § 497, *supra*.

3. These proper actions for division are precisely similar to the judgment or the action *finium regundorum*, whose object is the regulation of boundaries and the payment of damages (§ 498, *supra*).⁶

C. OF THE PAYMENT OF WHAT WAS NOT DUE (*solutio indebiti*).

1. Idea.

§ 500. From the payment of what was not due arises an obligation (*quasi ex contractu*). When one erroneously gave to or has performed something for another for which he in nowise was bound, he may redemand it the same as if he had only lent it to him.⁷ The term *solutio indebiti* (payment of what

¹ fr. 4. §§ 1. 2. D. 10. 1; Const. 1. C. 7. 51.

² fr. 1. 2. pr. D. 10. 3; fr. 43. D. 17. 2.

³ What one has already attained in one action he naturally cannot again demand in another: fr. 38. § 1. fr. 43. D. 17. 2.

⁴ §§ 3. 4. I. 3. 27. (28).

⁵ For greater particularity see *infra*, § 750.

⁶ *Unterholzner*, Verjährungslehre, § 19, Vol. 1; § 181, Vol. 2.

⁷ Gaius, III § 91; § 6. I. 3. 27. (28); § 1. I. 3. 14. (15); Dig. 12. 6; Cod. 4. 5; *Donellus*, Comm. jur. civ. Lib. 14, c. 11-19; the same, Comm. ad tit. Cod. de condictione indebiti; *Glück*, Comm. Vol. 13, § 827; *Unterholzner*, Schuldverh. Vol. 2, p. 29, *seq.*; *Koch*, Recht der Ford. Vol. 3, p. 314, *seq.*; *Christiansen*, Von der natu-

was not due) is here used in a very wide sense, and also includes the case where one performed for another labor,¹ or assumed to pay a debt for which he was not bound,² or relinquished a right or released a debt,³ under the impression that he was legally bound so to do.

2. Basis of the Obligation of Non-indebtedness.

§ 501. To found this obligation and the *condictio indebiti* it is requisite—

1. That what was paid or performed was not due (*indebitum*).⁴ He who therefore pays something for which he morally (*naturaliter*) was bound cannot reclaim it,⁵ nor can he reclaim who pays a debt before it is due if it were certain at the time of payment that the day for payment would arrive.⁶ It is not due (*indebitum*) when one pays something which not he but another owes, or when one pays his debt to a person who is not his creditor.⁷

2. That the payment was made in consequence of an excusable error. He therefore who knowingly or because of an inexcusable error pays something which he was not obliged to pay cannot in this action redemand it.⁸

3. That the receiver accepted the payment in good faith. If he knew that it was not due to him and yet received it, then he is generally regarded as a thief and as such is liable.⁹

4. That the imaginary debt paid does not belong to that class to which there is a penalty attached (*lis inficiendo crescit in duplum*).¹⁰

3. Action for Reimbursement and Restitution (*condictio indebiti*).

§ 502. The action founded for the reimbursement of the payment of what was not due is termed *condictio indebiti*; the object of which is—

ralis obligatio und condictio indebiti, Kiel, 1844; *Erzleben*, Die conditiones sine causa, 1 div. Die condictio indebiti, Leipzig, 1850. See § 509, note 2.

¹ fr. 26. § 12. fr. 40. § 2. D. 12. 6.

² fr. 31. D. 12. 6; Const. 3. C. 4. 5.

³ fr. 39. fr. 22. § 1. D. 12. 6.

⁴ fr. 22. pr. fr. 37. 40. D. 12. 6; fr. 16. § 1. D. 16. 1; fr. 45. pr. D. 50. 17; Const. 18. C. 4. 32; Const. 3. C. 3. 43.

⁵ fr. 13. fr. 26. § 9. fr. 38. pr. fr. 40. pr. D. 12. 6; fr. 9. §§ 4. 5. fr. 10. D. 14. 6; fr. 7. § 4. D. 2. 14; fr. 5. § 2. D. 46. 3. On the difficult passage *Frater a fratre* fr. 38. D. 12. 6, see *Glück*, Comm. Vol. 13, p. 38.

⁶ fr. 10. D. 12. 6. The same occurs also if one already paid before the happening of a condition which in any event will happen: fr. 17. 18. D. 12. 6. On the contrary, if one pay during the suspension of an ordinary condition it may be redemanded: fr. 16. pr. D. 12. 6.

⁷ fr. 65. § 9. fr. 19. § 1. fr. 22. pr. D. 12. 6; Const. 8. C. 4. 5. See fr. 26. §§ 3. 7. fr. 30. fr. 32. § 1. fr. 40. pr. § 2. fr. 43. D. 12. 6.

⁸ fr. 1. § 1. D. 12. 6; fr. 53. D. 50. 17; Const. 10. C. 1. 18. See fr. 2. pr. fr. 29. § 2. fr. 65. § 2. D. 12. 6; Const. 6. 7. 9. pr. C. 4. 5; Const. 9. 10. C. 6. 50. See *Savigny*, Syst. Vol. 3, p. 447, *seq.*

⁹ fr. 18. D. 13. 1; fr. 43. pr. § 1. D. 47. 2; fr. 38. § 1. D. 46. 3; *Glück*, Vol. 13, p. 74, *seq.*; *Unterholzner*, Schuldverh. Vol. 2, p. 38. *seq.*

¹⁰ § 7. I. 3. 27. (28); Const. 4. C. 4. 5. See § 209, note 5.

1. When a thing was given in payment for what was not due, to compel the receiver of it to return the thing itself or its value, or in the case of fungible things to return so much of them as he received, together with their fruits and accessions¹ (but not also with interest for delay²), as he at the time of the demand is still enriched by them.³ But the receiver is entitled to demand the costs expended by him on the thing.⁴

2. When one has erroneously given surety for what was not due or more than was due, or when he was not bound to do so, in consequence of which he had to pay the claim or more than was due, then the action proceeds for the release or restitution of the surety.⁵

3. When a right or a debt not due (*indebite*) has been relinquished or released, it proceeds for the restitution of the same.⁶

4. When a debt not due is assumed, it proceeds for its annulment and the return of the obligation executed for it.⁷

5. When labor for a debt not due was performed, it proceeds for compensation of the same by money.⁸

TITLE SECOND.

OBLIGATIONS ARISING FROM QUASI WRONGS (*obligationes quasi ex delicto*).

IDEA.

§ 503. As the obligations arising from quasi contracts (*obligationes quasi ex contractu*) resemble the obligations arising from contracts, so the obligations arising from quasi wrongs are similar to the obligations arising from wrongs, in that the former as well as the latter proceed not only for the payment of damages, but also for a private penalty. The obligations arising from quasi wrongs are always based on unlawful acts, but these are either not true wrongs (*delicta*) in the Roman sense or they will not produce according to general principles that obligation which by special ordinance and even by the praetorian edict should be produced.⁹

I. CASES IN WHICH ONE IS BOUND FOR THE UNLAWFUL ACTS OF ANOTHER.

A. POURING OR CASTING OUT (*effusum et dejectum*).

§ 504. In several cases one must answer for the damages caused by the unlawful act of another even if he did not participate in it, but for which he

¹ fr. 7. fr. 15. pr. D. 12. 6.

² Const. 1. C. 4. 5.

³ fr. 3. fr. 26. § 12. fr. 32. pr. fr. 65. §§ 7. 8. fr. 66. D. 12. 6; fr. 8. § 22. D. 2. 15. This point, at least for the case when fungible things were given, is much disputed.

⁴ fr. 65. § 5. D. 12. 6.

⁵ fr. 31. 39. D. 12. 6; fr. 1. pr. D. 36. 4.

⁶ fr. 22. § 1. D. 12. 6.

⁷ Const. 3. C. 4. 5.

⁸ fr. 26. § 12. fr. 40. § 2. D. 12. 6.

⁹ Inst. 4. 5. and Theophilus ad h. tit.; *Donellus*, Comm. jur. civ. Lib. 15, c. 42; *Weber*, Von der natürl. Verbindl. § 10-20; *Bucher*, Recht der Ford. §§ 152, 153.

nevertheless has redress against the wrongdoer. The cases are as follows: If something be poured or thrown out of a room into the street where persons usually pass (*ubi vulgo iter fit*), without previous warning, and damages are caused thereby, then, without further inquiry respecting the wrongdoer, the action *de effusis et dejectis* may be instituted against the occupant of the room, be he the lessee or the owner of it; in such case the Romans proceeded for double the amount of damages.¹ Several occupants are bound *in solidum*.²

B. DAMAGES IN SHIPS AND TAVERNS (*damnum in navi vel caupona datum*).

§ 505. If the goods of a traveller in a ship or in a tavern be stolen or damaged by the servants of the ship, owner or the landlord, then by the Roman law the owner of the goods can claim double compensation from the shipowner or landlord, who are liable for their servants.³ Several shipowners or landlords who conduct business together are responsible only according to the proportion of their part of the ship or tavern.⁴

II. CASE IN WHICH ONE BY HIS OWN ACT *quasi ex delicto* BECOMES BOUND.

OF THE JUDGE WHO MAKES THE SUIT HIS OWN (*judex, qui litem suam facit*).

§ 506. One also becomes bound by his own unlawful act, but only *quasi ex delicto*, because that act was not numbered by the Romans with the *delicta*, namely, when a *judex* purposely or inconsiderately makes an unlawful decision, then it is said of him that he makes the suit his own (*litem suam facit*); and if no legal remedy against the judgment be admissible, on the motion of the party injured by it he may recover damages and an arbitrary penalty.⁵ The action which may be instituted therefor against him is now termed action *syndicatus*.

III. APPENDIX. OF THINGS PLACED OR SUSPENDED (*positum aut suspensum*).

§ 507. When from a house in a frequented street something is set out or suspended, by the falling of which damage might be caused, any one observ-

¹ If a freeman were killed, then for a year a popular action for fifty gold pieces could be instituted; and if a freeman were injured, then he had a perpetual action and every other of the people an action for a year for an arbitrary amount: §§ 1. 2. I. 4. 5; fr. 1. pr. § 4. fr. 5. § 5. fr. 6. § 2. D. 9. 3; Glück, Comm. Vol. 10, § 706; Unterholzner, Schuldverh. Vol. 2, p. 789, seq.; Koch, Recht der Ford. Vol. 3, p. 1005.

² fr. 1. § 10. fr. 2. 3. D. 9. 3. See fr. 5. pr. D. 9. 3.

³ § 3. I. 4. 5; fr. 7. pr. § 1. D. 4. 9; fr. 5. § 6. D. 44. 7. This action *quasi ex delicto*, which was *mixta*, must not be confounded with the action *de recepto*, which is treated in § 473, *supra*. See the authorities there cited.

⁴ fr. 7. § 5. D. 4. 9.

⁵ Gaius, IV. § 52; pr. I. 4. 5; fr. 6. D. 50. 13; fr. 15. 16. D. 5. 1; Cod. 7. 49; Weber, Von der natürl. Verb. § 12; Unterholzner, Schuldverh. Vol. 2, p. 739, seq.; Koch, Recht der Ford. Vol. 3, p. 1002.

ing this can sue the owner or occupant, who knowingly permits it to lie or hang, in the prætorian action *depositis et suspensis* for a private penalty of ten gold pieces.¹ This action in the sources of the Roman law is brought into connection with the action *de effusis vel dejectis*. But it cannot arise out of an obligation *quasi ex delicto*, because it is always a popular action.

TITLE THIRD.

OF OTHER OBLIGATIONS.

§ 508. The obligations which arise neither from contracts nor from wrongs, but from appropriate legal provisions (*proprio quodam jure*), rest on very different sources of origin, which Gaius already shows by the addition *ex variis causarum figuris* (§ 384, *supra*, note 9). In the first two titles of the present chapter two kinds of them were treated on, the quasi contracts and the quasi delicts; a third kind, the *pacta*, were included in a former chapter. Of the remainder of them, only the most important will be referred to in the present title. Of the obligations to be here treated on several belong to the civil law, and in part especially resemble obligations from quasi contracts (§ 509, *infra*) and quasi delicts (§ 510, *infra*), and in part create an action which chiefly serves as preparatory to other actions (§ 511, *infra*). The remaining obligations are of prætorian origin, and mostly rest on modifications of the principles of the civil law over the person of the contract and quasi contract debtor (§ 512–515, *infra*), but part of them are primarily for the closing of a verbal contract (§ 516, *infra*).

I. RECLAMATIONS FOR PERFORMANCES WITHOUT CONSIDERATION (*condictiones sine causa*).

§ 509. The *condictio indebiti*, reclamation for performance, treated above in the quasi contracts (§ 500–502), is only one of those reclamations which are allowable because a change of property has taken place without sufficient legal cause (consideration),² which include, besides the foregoing—

1. The reclamation for performance which has not been followed by counter-performance (*condictio ob causam datorum* or *causa data causa non secuta*) may be instituted when one gave something for a future result which did not follow.³

2. The reclamation for an infamous purpose (*condictio ob turpem causa*),

¹ § 1. I. 4. 5; fr. 5. §§ 6. 9–13. D. 9. 3; Glück, Comm. Vol. 10, § 699.

² Saugny, System, Vol. 5, supp. VIII. 5, *seq.* Passages which, in general, relate to this are fr. 1. § 3. D. 12. 7; fr. 52. D. 12. 6; fr. 1. D. 12. 5.

³ Dig. 12. 4; Cod. 4. 6; Glück, Comm. Vol. 13, p. 9, *seq.*; Unterholzner, Schuldverh. Vol. 2, p. 49, *seq.*; Köck, Recht der Ford. Vol. 3, p. 337, *seq.*; Erzieben, Die conditiones sine causa; 2d part, Die obligatio ob rem dati re non secuta, Göttingen, 1833. Only one important case of this *condictio* appears in § 410, *supra*.

which presumes that the receiver accepted something for his own infamous purpose, and not also for the infamous purpose of the giver.¹

3. The reclamation for an illegal consideration (*condictio ob injustam causam*), which presumes that one has obtained something by an illegal act.²

4. The reclamation without consideration (*condictio sine causa*), in its narrow sense, which is allowable when something has been originally transferred to the defendant without legal consideration or for a legal consideration which has ceased.³

II. ACTION FOR DAMAGES DONE BY AN ANIMAL (*actio de pauperie*).⁴

§ 510. The owner of an animal which inflicts damages is bound to pay them. But if the animal be wild, then the owner must pay only when he is guilty of a wrong (*culpa*).⁵ If it be a tame animal, then the owner is bound in general only when it has not travelled and damages in a manner contrary to its nature (*contra naturam sui generis*). This kind of damages is termed *pauperies*, and the action against the owner for such damages is termed action *de pauperie*.⁶ This action is direct when the animal is a quadruped, and the action is *utilis* when it is another animal;⁷ and, generally, according to the rule that the injury follows the head (*noxa caput sequitur*), the action may be instituted against each owner of the animal who was so at the time of the institution of the action, but not against him who was so at the time the animal inflicted the damages.⁸ In every case it is optional with the owner

¹ Dig. 12. 5; Cod. 4. 7; *Donellus*, Comm. jur. civ. Lib. 14, cap. 25; *Glück*, Comm. Vol. 13, § 825; *Unterholzner*, Schuldverh. Vol. 2, p. 22, seq.; *Koch*, Recht der Ford. Vol. 3, p. 340, seq.

² fr. 6. 7. D. 12. 5; fr. 13. § 1. D. 16. 3; fr. 25. § 1. D. 47. 2; Const. 3. C. 4. 9; *Glück*, Vol. 13, p. 50, seq.; *Savigny*, System, Vol. 5, p. 518, seq. One kind of *condictio ob injustam causam* is the *condictio ex causa furtiva* (§ 479, *supra*).

³ Dig. 12. 7; Cod. 4. 9; *Glück*, Comm. Vol. 13, § 836; *Weber*, Von der nat. Verb. § 75-77; *Unterholzner*, Schuldverh. Vol. 2, p. 25, seq.; *Koch*, Recht der Ford. Vol. 3, p. 345, seq. Here also belong several cases which sometimes are incorrectly included with the cases of the *condictio indebiti*, namely, when one has knowingly or from unpardonable ignorance performed a prohibited act: fr. 23. § 2. D. 12. 6; Const. 9. C. 4. 29; Const. 3. C. 3. 43; Const. 36. § 2. C. 8. 54. And when one paid who cannot validly make payment, such as a pupil: fr. 29. D. 12. 6.

⁴ Inst. 4. 9; Dig. 9. 1; *Glück*, Comm. Vol. 10, p. 269, seq.; *Unterholzner*, Schuldverh. Vol. 2, p. 709, seq.; *Koch*, Recht der Ford. Vol. 3, p. 791, seq.

⁵ fr. 1. § 10. D. 9. 1; pr. I. 4. 9.

⁶ fr. 1. pr. §§ 2. 3. 12. 17. D. 9. 1. See fr. 52. § 2. D. 9. 2.

⁷ fr. 4. D. 9. 1. The direct action is based on the twelve tables. If one pastured his cattle on another's ground without authority, then the action *de pastu pecoris* may be brought against him; but if he pastured them on his own ground to permit them to eat another's things there found, then an action *in factum* may be brought against him. The action *de pastu* is also based on the twelve tables; fr. 14. § 3. D. 19. 5. See Paul, I. 15. § 1; Const. ult. C. 3. 35; *Glück*, Vol. 10, p. 275, seq.

⁸ fr. 1. § 12. D. 9. 1.

whether he will pay the damages inflicted or leave the animal to the injured person (*noxæ dare*).¹ Yet he loses the option if he knowingly falsely deny that the animal belongs to him; in which case he must pay the damages.² On the other hand, his obligation to pay the damages ceases if the animal die before the damages be claimed from him.³

III. ACTION TO EXHIBIT (*actio ad exhibendum*).⁴

§ 511. 1. If one has movable property in his possession which another has a legal right to inspect previous to the institution of suit, to satisfy himself if the property be really that which he has a right to claim,⁵ or to which he intended to make some claim,⁶ or that he may appropriately exercise his right of choice,⁷ on properly showing his interest⁸ he may institute the action *ad exhibendum* for the property to be exhibited or produced for his inspection.⁹ The expense of production or exhibition must be borne by him who desires it.¹⁰

2. This action may also be instituted when one's goods are connected with another's, in order that they may be parted without injury (§ 276, *supra*); the possessor of the connected things, on the demand of the other, is bound to part them so that each may have his own.¹¹

3. If there is on the ground and floor of A. the movable property of B. without A.'s fault and without his making claim for it, then B. can demand of A. in the action *ad exhibendum* that he permit him to have the property removed.¹² But B. must previously secure A. against present or future damages.¹³ In this third case the action *ad exhibendum* is never preliminary to another action. In all three cases it has the character of an *arbitraria* action.¹⁴ If the exhibition for which it was primarily instituted has become impossible by the fraud of A.,¹⁵ or if the judicial command for the exhibition

¹ fr. 1. pr. § 14. D. 9. 1.

² fr. 1. § 15. D. 9. 1.

³ fr. 1. § 13. D. 9. 1.

⁴ Dig. 10. 4; Cod. 3. 42; § 3. I. 4. 17; *Donellus*, Comm. jur. civ. Lib. 20, c. 9; Lib. 23, c. 6-8; *Glück*, Comm. Vol. 11, § 741; *Einert*, Tractat. de actione ad exhibendum, Leipsic, 1816; *Unterholzner*, Vol. 2, p. 111, *seq.*; *Koch*, Recht der Ford. p. 118, *seq.*

⁵ fr. 1. fr. 3. § 14. fr. 6. D. 10. 4.

⁶ fr. 3. §§ 3. 4. 5. 11. 12. fr. 12. § 2. D. 10. 4. This includes the case when one previous to the institution of a noxal action desires to see a slave (or an animal), in order to know if it be the same who committed the damage: fr. 3. § 7. D. 10. 4.

⁷ fr. 3. §§ 6. 10. fr. 12. § 2. D. 10. 4; fr. 8. § 3. D. 33. 5.

⁸ fr. 3. §§ 9. 13. D. 10. 4.

⁹ fr. 2. fr. 3. § 7. D. 10. 4.

¹⁰ fr. 11. § 2. D. 10. 4.

¹¹ fr. 23. § 5. D. 6. 1; fr. 6. fr. 7. §§ 1. 2. D. 10. 4.

¹² fr. 5. § 2-5. fr. 9. § 1. fr. 15. D. 10. 4; fr. 25. D. 19. 1; fr. 16. D. 19. 5.

¹³ fr. 5. § 4. D. 10. 4. See also fr. 5. § 3. D. 10. 4; fr. 7. § 2. D. 39. 2.

¹⁴ § 31. I. 4. 6.

¹⁵ fr. 5. § 2. fr. 8. fr. 9. pr. § 1-4. fr. 14. fr. 15. D. 10. 4; Const. 5. C. 3. 42.

be not obeyed,¹ then the action proceeds to the adjudication of B.'s interest in money;² this, however, is superfluous and inadmissible where the action should be preliminary to another action, because the plaintiff already, according to the judgment in the first action, must be paid for all that he could obtain by the second.³

IV. ACTIONES ADJECTIVÆ QUALITATIS.⁴

A. EXERCITORIA ACTIO.⁵

§ 512. He who fits out a ship, either as owner or charterer (*exercitor navis*), to carry on trade and navigation,⁶ becomes bound, in relation to the ship's business, by the convention of the master of the ship (*magister navis*), i. e., he who is intrusted with the conducting and management as well as the entire care of the ship, and his substitutes,⁷ so far as the orders or the instructions which the latter received from the former have not been transgressed. The owner or charterer can be sued on the master's contract in the prætorian *exercitoria* action with the same effect as if he had personally contracted.⁸ Several owners or charterers are bound *in solidum* when the reservation of the defence of division has not been made,⁹ but the several heirs of an owner or charterer are bound only *pro rata*.¹⁰ The ship's master in making a convention is nevertheless the proper debtor, and the creditor has the election whether he will proceed against him in the usual action or against the owner or charterer in the *exercitoria* action.¹¹

¹ fr. 3. § 2. fr. 5. § 2. fr. 7. §§ 4. 6. D. 10. 4; Const. 3. C. 3. 42.

² And in fact according to the estimate of the plaintiff on oath: fr. 3. § 2. fr. 5. § 2. D. 10. 4. See § 376, *supra*.

³ fr. 9. §§ 7. 8. fr. 10. fr. 11. pr. D. 10. 4. It is apparent that the action *ad exhibendum* has not an object other than that already given, and which is mentioned in fr. 7. § 1. D. 13. 1. and in fr. 1. § 6. D. 43. 16.

⁴ Savigny, Obl.-Recht, Vol. 2, § 54.

⁵ Gaius, IV. § 71; § 2. I. 4. 7; Dig. 14. 1; Cod. 4. 25; *Peckius*, Ad rem nauticam, with notes by A. *Vinnius*, Amsterdam, 1668, p. 69-187; *Glück*, Comm. Vol. 14, § 876.

⁶ It matters not whether the *exercitor* owns the ship or only charters it: fr. 1. § 15. D. 14. 1.

⁷ fr. 1. §§ 1. 5. D. 14. 1. Even if the ship's master be forbidden he may substitute some one: fr. 1. § 5. in fin. D. 14. 1.

⁸ fr. 1. §§ 7. 12. D. 14. 1; § 2. I. 4. 7; *J. Van Hall*, Diss. de magistro navis, Utrecht, 1822.

⁹ fr. 1. § 25. D. 14. 1.

¹⁰ fr. 14. D. 14. 3.

¹¹ fr. 1. § 17. fr. 5. § 1. D. 14. 1. Usually it is said that the action against the master generally ceases, or he has at least an exception to it, when he resigns his office. Reference is made to fr. 67. D. 3. 3; fr. 20. D. 14. 3; fr. 43. § 1. D. 26. 7; Const. 15. C. 5. 37; fr. 4. pr. D. 42. 1. At present the principal is regarded as the debtor, when the transaction was made in his name. See note 4, p. 160, *supra*, and § 427, notes 11-13.

B. ACTION AGAINST A PRINCIPAL (*institoria actio*).

§ 513. On the whole the same principles arise when the owner of a business (*dominus negotiationis*) appoints one as his agent (*institor*) and intrusts him either with the whole management of the business or a single branch of it. On the conventions which the agent makes with a third person, the owner may be sued according to the prætorian law in the *institoria* action.¹ This liability exists only in those transactions with which the agent was intrusted, and provided that he acted within the scope of his agency.² The agent cannot appoint a substitute if he be expressly forbidden to appoint.³

C. ACTION AGAINST A QUASI PRINCIPAL (*quasi institoria actio*).

§ 514. In analogy to the *institoria* action⁴ there arose a third action—the *quasi institoria*⁵ or *utilis institoria* action⁶—when one without having been appointed as agent or ship's master (*institor* or *magister navis*), but by authority of a third person, contracts a debt. This action is given to the creditor against the mandator of the proper debtor.⁷

D. OBLIGATION OF THE FAMILY FATHER THROUGH THE FAMILY SON (*filiusfamilias*) AND OF THE MASTER THROUGH THE SLAVE.

§ 515. The rule of the Roman law is that the master or father may acquire through the conventions of his slave or son subject to his power, but he is not bound by them;⁸ but to the latter, according to the prætorian law, for special reasons there are exceptions, which include—

1. If the son by the father's command⁹ contract with a third person, then the father may be sued on this in the action *quod jussio* for the payment of the whole debt contracted by the son.¹⁰

2. If he gave the son a *peculium* he will be bound by the conventions made by the son, even without his knowledge, to the extent of the *peculium* less the amount of his own claims, and he may be sued on the conventions in the action *de peculio*.¹¹

¹ Gaius, IV. § 71; Paul, II. 8; § 2. I. 4. 7; Dig. 14. 3; Cod. 4. 25; Glück, Comm. Vol. 14, § 891; Unterholzner, Schuldverh. Vol. 1, p. 413, seq.; Koch, Recht der Ford. Vol. 2, p. 597, seq.

² fr. 5. § 11–15. D. 14. 3.

³ fr. 1. § 5. D. 14. 1.

⁴ fr. 19. fr. 16. D. 14. 3; fr. 13. § 25. D. 19. 1; Const. 5. 6. C. 4. 25.

⁵ fr. 10. § 5. D. 17. 1.

⁶ fr. 19. fr. 10. § 5. fr. 13. § 25. D. 17. 1.

⁷ At the present day the principal only is regarded as the debtor.

⁸ pr. § 1. I. 2. 9; pr. I. 3. 28. (29); fr. 39. D. 44. 7; fr. 5. pr. D. 14. 5; Cod. 4. 26.

⁹ All that is said of the father in the following is also applicable to the master: pr. I. 4. 7.

¹⁰ Gaius, IV. 70; pr. § 1. I. 4. 7; Dig. 15. 4. and 14. 5; Const. 13. C. 4. 26; Cod. Theod. 2. 31; Glück, Comm. Vol. 14, § 919. On the present law, see end of § 512.

¹¹ Gaius, IV. § 73; Cod. Gregor. 3. 6; Cod. Theod. 2. 32; § 4. I. 4. 7; § 36. I. 4. 6; Dig. 15. 1; Const. 1. 2. C. 4. 26. For the unlawful acts of the son he is liable only so far as he was enriched by them: fr. 58. D. 50. 17; fr. 3. § 12. D. 15. 1. See,

3. If the father permitted the son to conduct a business in merchandise belonging to the *peculio profectitio* he will in like manner be bound by the son's conventions and may be sued by the son's creditors for their satisfaction in the action *tributoria* for proportional division of the merchandise on hand, without having the right to prefer his own claims.¹

4. If the object of the convention made by the son with a third person were applied to the father's benefit, then the father must pay the debts which the son contracted with the third person, however only so far as he was actually benefited by it; and the action which may be instituted against him for it is termed action *de in rem verso*.² This is now permitted *utiliter* in all cases when the object of a contract has been wholly or partly applied to the benefit of a third person, even if he who applied it were not subject to such third person's power.³ But by the Roman law this is only justifiable for the case when the co-contractor of the complainant acted as the business manager of such third person;⁴ and an advantage that a third party derived, which was only a casual consequence of the convention of two other persons, is not sufficient to found that action.⁵ All the actions named in § 512-515 are now termed actions *adjectitiæ qualitatis*, and each of them receives its special signification by the naming of the action from the transaction entered upon.⁶

V. OBLIGATION FOR SURETY AGAINST THREATENED DAMAGES (*cautio de damno injecto*).⁷

§ 516. Included in the cases in which, according to the prætorian law, a stipulation may be demanded⁸ is the case when the owner of immovable

generally, *Donellus*, Comm. jur. civ. Lib. 15, c. 50; *Glück*, Comm. Vol. 14, §§ 912, 913.

¹ *Gaius*, IV. § 72; § 3. I. 4. 7; *Dig.* 14. 4; *fr.* 11. § 7. D. 14. 3; *fr.* 5. §§ 15. 16. D. 14. 4; *Glück*, Comm. Vol. 14, § 894.

² *Gaius*, IV. §§ 73, 74; § 4. I. 4. 7; *Dig.* 15. 3; *Const.* 3. C. 4. 26; *Paul*, II. 9; *Glück*, Comm. Vol. 14, § 914.

³ *Noodt*, In comment. ad tit. *Dig.* 15. 3.

⁴ § 4. I. 4. 7; *Const.* 7. § 1. C. 4. 26.

⁵ *fr.* 49. D. 12. 6; *Const.* 8. C. 4. 34; *Const.* 15. C. 4. 2; *Const.* 13. C. 4. 10.

⁶ *fr.* 5. § 1. D. 14. 1. *E. g.*, *institoria venditi* action: *fr.* 5. § 12. D. 14. 3.

⁷ *Dig.* 39. 2; *Hesse*, Comm. de caut. damni inf., 2d ed. in German, Leipzig, 1841; *Unterholzner*, Schuldverh. Vol. 2, p. 714, *seq.*

⁸ Such stipulations were termed prætorian, judicial or common, according as they were imposed by the government as such, or by the judge as such, or at times by the former and at times by the latter, in contradistinction from conventional, i. e., by voluntary resolutions: *Tit. Inst. (de divisione stipulationum)* 3. 19. (20). The prætorian were further subdivided into three divisions. They were termed judicial when they only served as introductory to a suit, cautional when their object was to create new obligations and actions, and common when they had both these purposes at the same time: *Dig.* 46. 5. The stipulation *de damno injecto* belongs to the prætorian as well as to the cautional.

property or who otherwise is interested in it because of a real right or of an obligatorial relation¹ fears damages from² neighboring immovable property, *e. g.*, of a dilapidated building, for whose payment no one would be liable without a promise therefor.³ For securing the payment of the threatened damages he can demand from the owner⁴ or possessor⁵ of the property threatening damages, or from him who claims a real right in it,⁶ surety;⁷ and if no one give this voluntarily, the owner of the threatened property can initiate proceedings, which by continued refusal leads to the consequence that the ownership to the property threatening damages vests in him, and they who by their contumacy caused this lose their right to the property.⁸ At first he can demand *missio ex primo decreto*,⁹ by which he acquires the custody and the praetorian lien (§ 192, *supra*); but if no surety be now given, then after a time follows the granting of possession (*possidere jubere*)¹⁰ by the *missio ex secundo decreto*, which has the above effect.¹¹ If the execution of the first or

¹ fr. 18. pr. D. 39. 2; fr. 5. § 2. fr. 13. § 8. fr. 18. § 7-10. fr. 38. pr. fr. 39. § 2. D. 39. 2. This right is granted to the wives of the tenants of the neighboring houses and to all who reside with the indemnified neighbor: fr. 13. § 5. D. 39. 2. On the contrary, they who only pass to and fro, fr. 13. § 4. D. 39. 2, and the simple *bonæ fidei* possessor, have not this right: fr. 11. 13. § 9. D. 39. 2. But see *Reizenstein*, Diss. num *bonæ fidei* possessore deneganda sit damni infecti stipulatio? Munich, 1830.

² Often damages are not feared from the existing condition of immovable property, but for an act that one may lawfully do which may cause damages to neighboring or to all who reside with the indemnified neighbor in question, and he who is threatened with damages need not permit the act till surety be given. See, *e. g.*, § 511, *supra*, note 13. This surety is a stipulation *prætoria*, which also bears the appellation *cautio de damno infecto*.

³ This remedy is only subsidiary: fr. 32. fr. 13. § 6. fr. 18. §§ 2-4. 9. fr. 20. D. 39. 2. There is only one action by which it will not be excluded: this is the action *in factum legi Aquilæ accommodata*: fr. 18. D. 8. 2; fr. 27. § 10. D. 9. 2.

⁴ fr. 9. §§ 4. 5. fr. 10. fr. 15. § 27. fr. 22. D. 39. 2.

⁵ fr. 13. pr. fr. 39. § 1. D. 39. 2.

⁶ fr. 9. §§ 4. 5. fr. 11. fr. 15. §§ 25. 26. fr. 19. pr. fr. 22. D. 39. 2. Also from him who as owner, usufructuary, etc., of neighboring immovable property can exercise a praedial servitude in the thing threatening damage: fr. 13. § 1. D. 39. 2. Of several who hold in common, each has only to indemnify *pro rata*: fr. 27. in f. fr. 40. § 3. D. 39. 2. When not so held, one can be held to indemnify for the whole damage: fr. 9. §§ 4. 5. D. 39. 2.

⁷ Respecting the mode and manner how surety is to be given, see fr. 7. pr. fr. 30. § 1. D. 39. 2; fr. 9. §§ 4. 5. fr. 10. 11. 13. § 1. D. 39. 2.

⁸ fr. 9. pr. fr. 7. pr. D. 39. 2.

⁹ fr. 7. pr. D. 39. 2. The obligor for indemnity here remains in co-possession: fr. 15. § 29. D. 39. 2.

¹⁰ fr. 7. pr. D. 39. 2.

¹¹ Before Justinian the assignee received primarily only the bonitarian ownership, which first became changed into full ownership by usucapion; to which originally relate fr. 5. pr. fr. 12. fr. 15. §§ 16. 26. 27. fr. 18. § 15. D. 39. 2; fr. 3. § 25. D. 41. 2. By Justinian's Const. un. C. 7. 25. a usucapion was still necessary only when he

second command be illegally obstructed, then the payment of the damages arising can be demanded in an action *in factum*, in like manner as it could be by the action *ex stipulatu* if the obstructor had indemnified by a naked promise.¹

SECTION THIRD.

OF THE COERCIVE MEASURES AGAINST DEBTORS IN GENERAL, AND OF THE COMPETITION OF CREDITORS IN PARTICULAR.

INTRODUCTION.

§ 517. The contemporaneous coercion of several creditors against a debtor, whose property is not sufficient to satisfy them all, at the present day is termed competition of creditors, and the peculiar proceeding connected with it is termed procedure in competition. The question under what conditions and in what way a Roman competition procedure took place is only properly answerable in connection with the doctrine of the lawful coercive measures of the Roman law against non-paying debtors,² and herein we must precisely distinguish from each other the different periods of the Roman states. Hence the following arrangement:

I. PERSONAL EXECUTION.

A. ACCORDING TO THE TWELVE TABLES.³

§ 518. The compulsory measures against a debtor who does not voluntarily satisfy his creditors are of two kinds, namely, such as relate to the person of the debtor and such as relate to his property. For the former the term personal execution is used; for the latter, real execution. Both kinds of execution existed with the Romans, but at different times in different ways.

who acted as owner in the *missio* procedure was not actually so, but a third person was. In this case the *missio ex secundo decreto* only gives a title to usucapion, and so long as this is not followed the former owner of the property can defend against indemnity and reimbursement for expenditures: arg. fr. 28. D. 9. 4. Also he to whom a right in another's property belongs and against whom the former proceedings were not directed, fr. 15. § 25. fr. 12. D. 39. 2, can render his right valid so long as it is not lost by prescription (*e. g.*, the usufruct by non-user) if he indemnify and reimburse the expenditures made: fr. 19. pr. D. 39. 2. See fr. 30. D. 9. 4.

¹ fr. 7. pr. D. 39. 2. See also fr. 4. § 2. fr. 15. § 36. fr. 16. 17. 18. § 13-15. D. 39. 2; fr. 4. § 2. D. 43. 4. But one can also arrange for forcible execution: fr. 4. pr. § 1. D. 39. 2.

² Paul, V. 5a. 5b; Dig. 42. 1-8; Cod. Theod. 4. 20; Cod. Just. 7. 53. 59. 71-75; *Zimmern*, *Gesch. des R. Privatr.* Vol. 3, § 45, *seq.*, § 75, *seq.*, § 138; *Bethmann-Hollweg*, *Handb. des Civilproc.* Vol. 1, § 28-31, p. 296-346; *Rudorff*, *Röm. Rechtsgesch.* Vol. 2, § 89-93.

³ Besides the writings already cited, see *Savigny*, *Das altröm. Schuldrecht*, in his *Verm. Schriften*, No. 19 (Vol. 2, p. 396, *seq.*), and the writings cited in § 519 respecting the *nexum* and the *nezi*.

Respecting personal execution there were, according to the twelve tables, the following rules:¹ If one were adjudged to owe a sum of money, or if he in *jure confessus* owed a certain sum of money, and did not satisfy the complainant within thirty days, then the *legis actio per manus injectionem* might be instituted against him before the governmental authorities. If he contested the validity of the judgment, then he had to appoint a *vindex*, who assumed the whole matter. If he did not appoint one, then the debtor, without being previously assigned to the complainant, was taken by him and held as a prisoner, and who could invest him with irons. The debtor had yet the term of sixty days to agree with his creditors. Within this period the amount of his debt was proclaimed *tribus nundinis* (on market days), and if he did not release himself or found no purchaser to release him, then he suffered *capitis pœna*, i. e., loss of his entire habitation, and the creditor could kill him or sell him into a foreign land (*trans Tiberim*). If he became *adlictus* (the assigned) of several creditors, then the twelve tables directed that on the third market day the creditors shall cut his body into parts proportioned to their claims (*tertius nundinis partes secanto*).² In some favored claims, such as the solemn loans termed *nexum*,³ the execution was allowed though there was no previous judgment or *confessio in jure*.⁴

B. PERSONAL EXECUTION IN THE LATER PERIOD.

§ 519. The provisions in the twelve tables respecting prisoners for debt were never actually carried out; when the debtor did not satisfy his creditor within the specified time, the latter preferred to keep the debtor in prison till he by slave labor earned the amount of the debt. This personal execution was limited in the fifth century of the city.⁵ The *lex Poetelia*⁶ rendered inapplicable the above provisions to the *nexum*,⁷ and the condition of prisoners for debt was by this *lex* ameliorated. Subsequently the *legis actio per manus injectionem*, with most of the other *legis actiones*, was wholly abrogated.⁸ But the personal execution did not thereby wholly cease. It

¹ Gellius, XV. 13, XX. 1; Gaius, IV. §§ 21, 25.

² Respecting the various interpretations of the *in partes secanto*, see Zimmern, *Gesch. des R. Privatr.* Vol. 3, § 46.

³ On this see *supra*, note 1, p. 334, and § 519, *infra*, note 7. It is characteristic that here he who gave to the other the metal (money) therewith declared that it shall be adjudged that the other shall return to him the same sum at a designated time with interest (of course the interest could be omitted).

⁴ See end of § 203, *supra*, on the *legis actio per manus injectionem*.

⁵ We refer to the *lex* which some believe to be a *lex Valeria* of the year 412.

⁶ Of the year 428, or more probably of the year 441.

⁷ Livy, VIII. 28; Cic. de rep. II. 34; Dionys. fragm. XVI. 9; Varro de ling. lat. VII. § 105. The *nexum* and *nexi* are treated on by Hugo, *Rechtsg.* p. 282; Niebuhr, *Roman history*, Vol. 1; Schœurl, *Vom nexum*, Erlangen, 1839; Bachofen, *Das nexum*, etc., Basel, 1843; Huschke, *Über das Recht des nexum*, Leipzig, 1846.

⁸ Livy, XXIII. 14; Val. Max. VII. 6. 1; Sallust, *Cat. c.* 33; Cicero *pro Flacco*,

was still always allowed against him who was judicially adjudged to pay a sum of money, or who as *confessus* was in the same position as if he had been so adjudged and did not voluntarily pay.¹ But it now required a previous official assignment of the debtor to the creditor (*addictio*), which was granted on the simple application of the complainant in the action *judicati*. The consequence of which was the simple holding of the debtor, and perhaps, when the creditor required it, that he should labor for the earning of the sum indebted.² Death or sale into slavery is no longer spoken of.

II. REAL EXECUTION.

A. ON SINGLE THINGS.

§ 520. There is almost a total lack of information respecting real execution in the oldest period of the Roman state, and particularly in the law of the twelve tables, and it is therefore frequently remarked that the complainant was, with slight exceptions, limited to personal execution if the defendant did not voluntarily perform what he should.³ At the period of the classical jurists we find, as a means for the execution of the judgment for money—the only proper judgment, which resulted from the process *per formulam*—the judicial distress (*pignoris capio*, *pignora in causa judicati capta*) in daily use; but the specific rules thereon were first introduced by the imperial rescripts.⁴ The arbitrament arising in the *arbitrarie* actions for the enforcement of that for which the complainant's claim was primarily instituted could, at least if it were a command to restore (*jussus de restituendo*), be executed forcibly, according to a Pandect passage of Ulpian.⁵ And when, according to the Justinian law, there may be a proper judgment for something else than money (note 3, p. 173, *supra*), such judgment may be executed forcibly.

c. 21; pro Rosc. Com. c. 14; de oratore, II. 63; Lex Rubria, c. 21. 22; Seneca, de benef. III. 8; Pliny, ep. III. 19; Gellius, XX. 1; Quinctilian, Inst. or. V. 10. 60; VII. 3. 26; III. 6. 25; Id. declam. 311; Gaius, III. § 199; fr. 23. pr. D. 4. 6; Paul, V. 26. § 2; fr. 34. D. 42. 1; Const. 1. C. 7. 71.

¹ Gaius, IV. § 25.

² Our sources are silent on this last point. The meaning of the ordinances in Cod. Theod. 9. 11. Cod. Just. 9. 5. Const. 23. C. 1. 4. is disputed.

³ The formal *pignoris capio*, which the complainant at the time of the procedure *per leges actionem* might take without official authority and without having previously instituted suit for his claim (end of § 203, *supra*), was limited to a few cases which belonged to the public law and to the *jus sacrum*. The official *pignoris capio* is only mentioned as a means for the collection of public penalties for money: Livy, III. 38; XXXVII. 51; Cicero de orat. III. 1; Phil. I. 5; Gellius, XIV. 7; from which it is frequently inferred that it was not applicable in usual civil suits. If the object were assigned to the claimant by the magistrate because the other parties did not object (*in jure cessio*), then the magistrate regularly delivered it to him.

⁴ See §§ 342 and 348, *supra*.

⁵ fr. 68. D. 6. 1. See note 11, p. 177, *supra*.

B. REAL EXECUTION ON THE ENTIRE PROPERTY.

1. *History*.¹a. *The Oldest Missio in Possessionem Bonorum rei Servandæ Causa.*

§ 521. A procedure, which was similar to the present competitive procedure, was introduced by the prætorian *missio in bona rei servandæ causa* and during the empire by *cessio bonorum*. The oldest *missio in bona* (transfer of a debtor's property) of this kind probably was not enforced against an adjudged debtor or one that confessed the debt (*debitor judicatus vel in jure confessus*), but against him who craftily concealed himself from his creditors² (*qui fraudationis causa latitat*) so that he could not be summoned *in jus*, and for whom no representative appeared who was prepared to assume his defence; wherefore the institution of the action and the contumacious process against him, according to the *ordo judiciorum*, was impossible.³ As in the olden time it was not permitted to appoint a curator to defend the suit for the defrauder so as to bind him, a procedure was introduced which, if it did not compel the debtor to appear, accomplished the object by giving him a universal successor who assumed the whole of the active property and a certain quota of the debts, and then against whom the several creditors of the defrauder could legally enforce their claims up to the quota.⁴ The procedure began with one or more creditors effecting for themselves the *missio in bona*, which was then publicly made known.⁵ If he who was put in possession remained thirty days in the co-possession⁶ of the property without the debtor appearing or another having properly undertaken his defence,⁷ then they

¹ Besides the writings cited in § 517, note 2, *supra*, there are *Stieber*, De bonorum emptione, Leipzig, 1827; *Dernburg*, Über die emtio bonorum, Heidelberg, 1850; *Hartmann*, Über das Contumacial-Verfahren, Göttingen, 1851.

² *Dernburg*, § 1-3.

³ Cicero pro Quinctio, c. 19; fr. 7. D. 42. 4; Gaius, III. § 78; Theophil. ad tit. I. 3. 12. (13).

⁴ A type of this prætorian universal succession was the probable *sector bonorum* of the civil law, i. e., he who bought the entire property confiscated as a penalty for the purpose of realizing from it by retail. As the estate was usually solvent, it was generally undertaken to fully satisfy the creditors, and the payment of a purchase price was even promised to the state: Cicero pro Rosc. Amer. c. 8. c. 43, *arg.*; Varro, de R. R. 2. 10; Gaius, IV. § 146; Pseudo-Asconius ad Cic. Verrin. I. 20, 23. For this sale of goods the expression *bona publice veneunt* was frequently used in contradistinction therefrom: Gaius, I. § 27; III. § 154; IV. § 146; § 8. I. 3. 15. (16).

⁵ Gaius, III. § 79; Lex Rubr. c. 22. This *proscriptio* should not be mistaken for the later writing, which contained an invitation to purchase. See, particularly, *Huschke*, Über das Recht des Nexum, p. 151, Rem. 215.

⁶ Not in juridical possession: fr. 3. § 23. D. 41. 2; fr. 3. § 8. D. 43. 17; fr. 10. § 1. D. 41. 2. Nor could the debtor be dispossessed: Cicero pro Quinctio, c. 27. See fr. 15. § 20. D. 39. 2; fr. 5. pr. D. 36. 4.

⁷ This is the moment in which the defrauder became infamous.

prayed for permission that one of their number be authorized to sell the property and be named as the *magister bonorum vendendorum*. This person took an account of the property, and when he found an acceptable purchaser presented the proposed convention with him to the proper officer, who, if not deeming it objectionable, gave permission to publish the conditions of sale, and in accordance therewith to award the property after the lapse of thirty days.¹ Within this time the debtor could yet appear and thereby avert the awarding of the property to the purchaser,² or creditors or kin having a right of pre-emption could take the property at the price offered.³ The consequence of the award was a prætorian universal succession of the purchaser (*bonorum emtor*) in the property of the debtor;⁴ by virtue thereof he could maintain the right to the property of the latter by *utiles* actions⁵ and exceptions⁶ and employ an interdict *adpiscendæ possessionis*;⁷ on the other hand, he had to pay the actionable debts to the amount of the quota which he had promised to pay before the transfer to him, and could be sued therefor by the creditors in the *utiles* actions.⁸ The defrauder remained indebted for the balance.⁹ The validity of the sale (*bonorum venditio*) could be contested by the debtor by the institution of a prejudicial action¹⁰ (by which his solvency or insolvency was ascertained).

b. *Extension of the Missio in Bona Rei Servandæ Causa to other Cases.*

§ 522. The procedure against the debtor who fraudulently concealed himself (*debitor, qui fraudationis causa latitat*) was soon extended by the prætorian edict to the case¹¹ of the debtor who died without being inherited

¹ Gaius, *supra*; Theophil. *supra*; *Dernburg*, § 13.

² Gaius, IV. § 102; fr. 33. § 1. D. 42. 5. See fr. 3. D. 42. 3; Const. 2. C. 7. 71.

³ fr. 16. D. 42. 5; fr. 60. D. 2. 14.

⁴ Gaius, II. § 98; III. §§ 77. 81.

⁵ It gave particularly a *Serviana* action, *qua bonorum emtor ficto se herede agit*, and a *Rutiliana* action, whereby the *intentio* was fixed on the person of the defrauder, but the *condemnatio* on that of the complainant (similar to the conducting of a suit by a representative): Gaius, IV. § 35.

⁶ The corporeal things of the defrauder primarily became only his bonitarian property, and then first became his perfect property by usucapion: Gaius, III. § 80.

⁷ It was similar to the interdict *quorum bonorum*, which the *bonorum possessor* had, as also similar to the *sectorium*, which the *sector bonorum* had, and was termed by some *possessorium*: Gaius, IV. § 134–136.

⁸ Gaius, III. § 81; Theophil. *supra*. But see *Dernburg*, § 16.

⁹ Gaius, II. § 155. See fr. 6. D. 42. 3. But fr. 25. § 7. D. 42. 8. appears to be *contra*. But see *Dernburg*, § 17.

¹⁰ fr. 30. D. 42. 5; fr. 7. § 3. D. 42. 4. Respecting other actions, see Gaius, III. § 220; fr. 51. pr. D. 42. 1.

¹¹ Cicero pro Quinctio, c. 19, mentions exiles as a third class against whom this procedure in the edict is prescribed. See Livy, X. 9; Sallust, Cat. 51. § 22. But this case soon disappeared with the right of exile, and it is not even mentioned in

to.¹ But in such case after the lapse of fifteen days there should be a prayer for the nomination of a master to sell the property, and the term from the last order of the proper officer to the actual award of the property should in this case consist of twenty days.² The simple taking of possession (*missio in bona*) was extended to several other cases in which there was no proper representation of the debtor, and only under certain circumstances³ the sale of the property should thereupon follow.⁴ On the other hand, those rules which were applicable to the case of the proper defrauder were applied to the case when the debtor was either adjudged as such or confessed the debt (*iudicatus vel in iure confessus est*) and did not pay within the legal term.⁵ But frequently a special real execution might in such case take the place of the procedure (§ 520, *supra*).

Gaius, III. § 78. The *missio in bona* was also extended to the case when one who was in the *potestas* was not protected by the possessor of it against the debts which the former as *homo sui iuris* contracted by conventions or other similar transactions. In this case the object of the award and sale was that estate that would have belonged to the debtor if he had remained *sui iuris*: Gaius, III. § 84. The same principle is applicable to the debts of one *in manu* or *in mancipio*, even when they were contracted while in the *potestas*: Gaius, III. § 80.

¹ Cicero, I. c.; Gaius, I. c. If the party summoned were not inclined to accept the inheritance because of over-indebtedness, then the creditors frequently allowed an abatement on their claim so that he might accept it, and they thereby avoided the inconveniences of the *missio* and *venditio*. Such abatements were particularly favored, and the rule arose that when the majority of the creditors of the estate ceded to the heirs before entering upon the inheritance an estate of a certain per centum the minority must allow an equal deduction. The majority of the votes was primarily computed according to the amount of claims, and only when these were equal, according to the number of the creditors; in this the pawn creditors could not be coerced by the chirograph creditors: fr. 7. § 17-19. fr. 8. 9. 10. D. 2. 14; fr. 58. § 1. D. 17. 1. These rules respecting the compulsory abatement are still retained regardless of the benefit of the inventory inserted in the *Corpus iuris* by Justinian. In Germany they are very frequently applied to living insolvent debtors, but are only justified where prescribed by particular laws or customs.

² Gaius, III. § 99.

³ But not when the debtor was a pupil or was absent on the business of the state for not a bad motive: fr. 6. § 1. D. 42. 4.

⁴ *Dernburg*, § 5, *seq.* Such cases are—

1. When the defendant failed to appear on a certain day *in iure*, as he had promised and had given security thereto: fr. 2. D. 42. 4. See Rubr. D. 2. 6; fr. 5. § 1. D. 2. 8.

2. When the defendant was absent without having secreted himself fraudulently and was not represented: fr. 1. D. 3. 5; fr. 21. D. 4. 6. See fr. 199. D. 50. 16.

3. If an artificial person be sued and no representative of it appear: fr. 1. §§ 2. 3. D. 3. 4; fr. 5. D. 42. 5.

4. If a physical person be sued who was unable to represent himself, *e. g.*, a pupil: fr. 3-6. D. 42. 4.

⁵ Gaius, III. § 78.

c. *Introduction of the Voluntary Assignment by an Insolvent* (*cessio bonorum*),
and d. *Of Preferential Debts* (*privilegia exigendi*).

§ 523. The *Lex Julia de cessione bonorum*,¹ which probably originated with Julius Cæsar or Augustus, introduced a new procedure in relation to a bankrupt's estate (*venditio bonorum*), which theretofore was governed by the *missio in bona*. The debtor impoverished by misfortune² could by this law anticipate his creditors, who would require a *missio in bona*, by voluntarily ceding his estate to them.³ The estate did not thereby pass over to the creditors,⁴ nor was the debtor wholly released from his indebtedness to them,⁵ but nearly the same relations existed as if a *missio in bona* had taken place.⁶ However the *cessio bonorum* gave the debtor a threefold advantage, namely: he was exempted from imprisonment,⁷ as also from infamy,⁸ and he had an exception to all actions on claims which did not arise afterwards, to the extent that the ceded property had not satisfied his creditors,⁹ but only till he again acquired property, and in relation to the after-acquired property he had the benefit of sustenance (*beneficium competentie*)¹⁰ (§ 532, *infra*). The sale of the estate resulting from the *missio in bona* or *cessio bonorum* affected the pawn rights, as such, of the several creditors as little as the servitudes imposed on the debtor's things;¹¹ it affected only the claims that were to be enforced by personal actions against the purchaser of the property (*bonorum emtor*). These actions were originally on an equality. The *bonorum emtor* had to pay the same percentage to all. But under the emperors privileged debts arose, in consequence of which these debts were preferred in the *venditio bonorum* (§ 526, *infra*). The result was that now the master to make the sale could not reserve aught out of the property sold for the simple creditors till after the privileged creditors should be fully satisfied.

e. *Introduction of the Sale of the Property by Retail* (*distractio bonorum*) and
Disuse of the proper Sale of the Property (*venditio bonorum*).

§ 524. The characteristic of the competitive procedure, heretofore presented, by which a universal successor of the debtor was skillfully con-

¹ Gaius, III. § 78; Cod. Theod. 4. 20; Dig. 42. 3; Cod. Just. 7. 71.

² Const. 1. C. Th. 4. 20.

³ No kind of formality need be observed therein: fr. 9. D. 42. 3; Const. 2. C. Th. 4. 20; Const. 6. C. 7. 71.

⁴ Const. 4. C. 7. 71.

⁵ Const. 1. C. 7. 71.

⁶ Gaius, III. § 78, *seq.* See fr. 17. pr. D. 4. 8; fr. 3. 5. D. 42. 3; Const. 2. C. 7. 71.

⁷ Const. 1. C. 7. 71.

⁸ Const. 11. C. 2. 12.

⁹ fr. 4. § 1. D. 42. 3; Const. 3. C. 7. 72; § 4. I. 4. 14.

¹⁰ By which every new *bonorum venditio* was obstructed because of older debts: fr. 6. 7. D. 42. 3.

¹¹ On the right of property which a third person can enforce to a thing which was in the possession of the debtor: fr. 24. § 2. in f. D. 42. 5; Const. 1. C. 7. 73.

trived, whose efforts were naturally directed to the retention for himself of as much of the insolvent estate as possible, gradually fell into disuse under the emperors, because the idea was cherished that the object could be attained without those means, even if the debtor did not appear or died without heirs, by the appointment of a curator of the property.¹ At length it resulted that when a cession of the property (*cessio bonorum*) or taking possession of it (*missio in bona*), which led to the sale of the property, took place, a curator would be immediately named to manage and sell it by retail (*bona distrahit*), in order to divide the proceeds among the creditors who had properly presented and proved their claims according to the classification announced by the proper authority. This new procedure was prescribed by a *senatusconsultum*, which Gaius mentions for the case of a debtor who had the rank of a senator.² Before or soon after this prescript it frequently happened that the creditors prayed for it as a privilege,³ and after the abolition of the old *ordo iudiciorum* it became general.⁴

2. Justinian Law.

a. Of the Competition of Creditors generally.⁵

§ 525. According to the law of Justinian the creditor's grasp is on the debtor's entire property, as it previously was either by *cessio bonorum* or by *missio in bona*. The cession of the property (*cessio bonorum*) has for the debtor the advantages mentioned *supra* (§ 523). The *missio in bona rei servandæ causa* may in the cases mentioned *supra* (§§ 521, 522) be effected by one or more creditors; the first placed in possession of the debtor's estate may join with themselves other creditors if they live in the province in which the placing in possession took place, within two years, and others within four years, with the same effect as if they had been placed in possession contemporaneously.⁶ The magistrate must secure only such claims of those creditors who were first placed in possession as have been recognized either by legal judgment, *confessio in iure*, or are properly proven;⁷ and the participating creditors who apply later need not submit to those already in possession if they have not properly proven their claims.⁸ The sale of the estate will be ordered by the magistrate only after the expiration of the legal time.⁹ Till

¹ *Dernburg*, §§ 19, 20.

² *fr.* 5. D. 27. 10. But in this case the debtor must not be infamous.

³ *fr.* 9. D. 27. 10.

⁴ *pr.* I. 3. 12. (13); *Theophil.* ad. h. l.

⁵ *Bethmann-Hollweg*, § 31.

⁶ *Const.* 16. C. 7. 72. In which manner these are to be apprised of the first placing into possession, no passage expressly speaks.

⁷ *Bethmann-Hollweg*, p. 345.

⁸ *Const.* 10. C. 7. 72; *Const.* 15. C. 4. 30.

⁹ *Const.* 10. § 1. *Const.* 9. C. 7. 72. What term must be observed is not expressly mentioned. Perhaps it was the four years within which the creditors could apply. See *Bethmann-Hollweg*, p. 342. Previous to the sale the debtor might avoid it by payment or by a defence with surety.

then it will be managed by the curator chosen by the creditors. He then sells it by retail. He need not necessarily sell it publicly; but in a sale by retail there must be a legal record made, in which he must swear that it was sold as advantageously as it was possible for him to do.¹ The magistrate directs the division of the proceeds.²

b. *Of the Rank of the Competitive Creditors particularly.*³

§ 526. By the Justinian law (see § 523, *supra*) the lien or pawn creditors, to the extent of their liens or pawns, do not participate⁴ in the *missio in bona* and in the *cessio bonorum*, but only chirograph creditors, *i. e.* first those who have no lien or pawn on property of the common debtor, and then those whose lien or pawn does not cover the whole property, participate to the extent that their claims amount to more than will be collected from their liens or pawns. But the chirograph creditors, who are to be regarded in the division of the proceeds of the property, are divided into two classes, namely, into such as have a *privilegium exigendi*, privileged creditors, and into simple or non-privileged creditors; the former take absolute precedence of the latter.⁵

¹ Const. 10. § 1. C. 7. 72.

² Const. 8. C. 7. 71; Const. 6. C. 7. 72. We do not know in which form single creditors were preferred to others. If the proceeds amounted to more than the claims of the creditors who have claimed, then the excess was deposited for those who might yet claim: Const. 10. § 1. C. 7. 72.

³ *Gmelin*, Die ordnung der Gläubiger im Gantprocesse, 5th ed. Ulm, 1813; *Reinhard*, Die ordnung der Gläubiger im Concourse, Dresden, 1826; *Köri*, System des Concurrs., 2d ed. Leipzig, 1828, p. 237, *seq.*

⁴ These retain their liens as if no competition had taken place, and the competitive creditors must, when demanded, pay to those who have the liens or pawns the balance if they do not prefer to satisfy them by payment. The present competitive proceedings, resting on customs and particular laws, are distinguished from the Roman in that the competition tribunal at the present day exercises greater power in conducting the whole procedure than the Romans did. And at the present day the lien creditors must present their claims during the same time and must participate in the competition the same as the chirograph creditors. But they generally take precedence of the latter to the extent that the proceeds of their liens and pawns cover. By the Roman law this was always the case. See note 5.

⁵ As at the present day, the lien and pawn creditors must also participate in the competition (see note 4); but so far as they can be satisfied out of the proceeds of their liens, by the Roman law they always take precedence of the chirograph creditors, and, as among themselves, the privileged creditors do not take precedence of the unprivileged; hence the present competitive creditors must be divided into four classes, if the following circumstance does not require us to form five such classes. Some creditors, namely, who have no liens or pawns are, by the present custom, preferred to all other creditors, as also to the whole of the lien or pawn creditors; such creditors are those who have claims for burial expenses and those who have claims for servants' wages. Such creditors are termed absolutely privileged chirograph creditors. Thus at the present day the competitive creditors may be divided into the following five classes:

Such a *privilegium exigendi*,¹ by the Roman law, was given among others to several persons who subsequently received a general statutory lien; hence to some to whom, by the law of Justinian, such privilege was superfluous. By that law the following creditors are also preferred:

1. He who has a claim for the expenses of the funeral of the debtor or for another whom it was the debtor's duty to bury.²

2. The fiscus for all claims for which he has no hypotheca, *e. g.*, which were ceded to him by a private person;³ excepting, however, the money penalties which the fiscus claims, but which do not rest on a convention.⁴

3. The cities for all their claims against the debtor.⁵

4. The actual and the putative wife and the bride for her *dos*. For the actual wife for her *dos* it is at present needless, whenever she has a general statutory hypotheca;⁶ but for the putative wife⁷ and the bride it is still advantageous.⁸

5. Those persons who have a curator and who have not a statutory lien on the curator's property; also those who were judicially declared prodigals, sick and infirm persons, and also those who have a pro-tutor.⁹

First. The absolutely privileged chirograph creditors. These precede all other classes.

Second. The privileged lien or pawn creditors; respecting these see § 349–352, *supra*. Those whose privileged liens or pawns embraced the whole property belong to this class with their whole claim, and therefore precede absolutely the following classes, but precede each of the remaining classes only to the extent that the proceeds out of their liens or pawns cover.

Third. The not privileged lien or pawn creditors. See § 354, *supra*. Here is to be distinguished the same as in the second class.

Fourth. The simple chirograph creditors, *i. e.*, such as have a *privilegium exigendi*. This is important to a lien or pawn creditor, privileged as well as unprivileged, whose lien or pawn does not cover the whole property, to the extent that he has not been satisfied in the second or third classes (*i. e.*, out of the proceeds of his liens or pawns). The fourth class always absolutely takes precedence of the fifth.

Fifth. All other creditors, including the pawn creditors whose lien or pawn does not cover the whole property, to the extent that they are not satisfied in the second or third classes; provided that they have not a *privilegium exigendi*.

¹ *Gmelin, supra*, cap. 7, p. 554, *seq.*; *Frister, De privilegio creditorum personali*, Göttingen, 1804.

² fr. 45. D. 11. 7; fr. 17. pr. D. 42. 5. See also fr. 14. § 3–5. fr. 37. D. 11. 7.

³ fr. 10. pr. D. 2. 14; fr. 6. pr. D. 49. 14. See also fr. 6. § 1. D. 49. 14.

⁴ See note 8, p. 396.

⁵ fr. 38. § 1. D. 42. 5.

⁶ *I. e.*, if they are not excluded from it because of their religion. See § 344, note 10, *supra*.

⁷ fr. 22. § ult. D. 24. 3.

⁸ fr. 17. § 1. D. 42. 5; fr. 74. D. 23. 3; Const. un. C. 7. 74.

⁹ fr. 13–23. D. 42. 5. This privilege does not exist against the curator of an absentee's property or of an inheritance pending its acceptance (*hereditatis jacens*), with the like effect as it exists against the *curator bonorum* in competition: fr. 22. § 1. D. 42. 5. See *supra*, note 6, p. 273.

6. He who has advanced money for the renovation of a building.¹

7. He who has a claim for proportional reimbursement on account of improvement of a building which belongs to the debtor and himself in common.²

8. He who lent money for the building, purchase or fitting out of a ship.³

9. He who deposited money with a money broker (*argentarius*) without interest.⁴ The order of the creditors in these classes is as follows: No. 1 absolutely takes precedence of all the others,⁵ and No. 2 all the following;⁶ Nos. 3 to 8 are equal to each other, regardless of the ages of their claims, and are satisfied *pro rata*.⁷ With No. 9 it is doubtful; according to one passage in the Pandects the depositor of the money takes precedence of all other privileged creditors, but according to another passage he must succeed all the other creditors.⁸ The simple chirograph creditors are on an equality, without regard to the ages of their claims, and are satisfied *pro rata* out of that which is left by the privileged creditors.⁹

C. APPENDIX. ALIENATION IN FRAUD OF CREDITORS.¹⁰

§ 527. By the Roman law the debtor does not¹¹ lose the power of disposition of his property by inability of payment nor even through *missio bonorum* or *missio creditorum in bona*, but only when it is alienated in a proper manner for the benefit of creditors. The prætor, however, established the principle that when a debtor who is insolvent or becomes so by the intended alienation alienates his property with the fraudulent purpose of injuring his creditors, they, or the *curator bonorum* in their name, shall have the right

¹ fr. 25. D. 12. 1; fr. 24. § 1. D. 42. 5.

² fr. 52. § 10. D. 17. 2.

³ fr. 26. 34. D. 42. 5.

⁴ fr. 7. §§ 2. 3. fr. 8. D. 16. 3; fr. 24. § 2. D. 42. 5.

⁵ Paul, I. 21. § 15; fr. 45. D. 11. 7.

⁶ fr. 34. D. 42. 5.

⁷ fr. 32. D. 42. 5; Const. 12. pr. C. 8. 18.

⁸ fr. 7. §§ 2. 3. D. 16. 3. and *contra*, fr. 24. § 2. D. 42. 5. Both passages are from Ulpian ad Edictum.

⁹ Const. 6. C. 7. 72. It is doubtful whether the fiscus with his claim for pecuniary penalties must not stand behind all other creditors. See fr. 17. D. 49. 14. and Const. un. C. 10. 7. with fr. 37. D. 49. 14.

¹⁰ Dig. 42. 8; § 6. I. 4. 6; Cod. 7. 75; *Donellus*, Comm. jur. civ. Lib. 15, c. 41; *Haenlein*, De actionis Paulianæ natura, Onoldi, 1785; *Happel*, Beobachtungen beim Ausbruche eines Concurse, Gieszen and Darmstadt, 1801; *Dabelow*, Vom Concurse der Gläubiger, p. 375-477; *Trip*, Diss. de actione Pauliana, Leyden, 1829; *Kori*, Syst. des Concurse, p. 56-72.

¹¹ fr. 6. § 7. fr. 10. § 16. D. 42. 8; *Happel*, p. 47, *seq.* At the present day, by the initiation of the competition, the debtor is wholly deprived of every disposition over the bankrupt estate, so that every direction which he afterwards makes concerning it is *ipso jure* invalid, and the *Pauliana* action was necessary for only such transactions as preceded the initiation of the competition.

to move for the rescission of such alienation and reclaim that which was alienated or require damages therefor from the alienee. The peculiar conditions and provisions of this suit are as follows:

1. The alienation must be one whereby the debtor diminishes his estate. If he merely lost a profit which he might have acquired, then the suit cannot be instituted.¹

2. The alienation must have been undertaken by the debtor *fraudationis causa*, i. e., with the fraudulent purpose to injure his creditors. Such a fraud of the debtor is now generally to be presumed when he knows his insolvent condition and, notwithstanding, knowingly and purposely aliens only to injure his creditors; nevertheless, for the founding of the suit, if the above alienation were *onerous*, then the co-knowledge of the fraud of him with whom the debtor contracted is also requisite. If, on the contrary, the alienation were *lucrative*, such as a gift, then it does not depend on the acquirer's co-knowledge.²

3. The action *Pauliana* cannot be instituted if the alienation were such only that before the resulting *cessio bonorum* or *missio in bona* the debtor, though insolvent, pays a creditor a debt due,³ even if this creditor would have stood behind other creditors in competition.⁴ But it may be instituted if the debtor, with a fraudulent intent, pay one of the creditors after maturity, or if he pay before maturity, or pay a debt subject to a condition, or with a fraudulent intent against one creditor allow a lien or pawn to the other who knew of the fraudulent intent.⁵

Pauliana Action and Interdict Fraudatorium.

§ 528. When an alienation to defraud creditors is made, the *Pauliana* action may be instituted as follows:

¹ fr. 6. pr. § 1-5. D. 42. 8; Const. 2. 3. C. 7. 75; arg. fr. 28. pr. D. 50. 16. Only the fiscus can institute it in this case, but only for his benefit: fr. 45. pr. D. 49. 14.

² fr. 1. pr. § 2. fr. 6. §§ 8. 11. fr. 17. § 1. D. 42. 8; Const. 5. C. 7. 75.

³ fr. 6. §§ 6. 7. fr. 10. § 16. fr. 24. D. 42. 8; fr. 15. D. 15. 1. This does not permit an extension to a *datio in solutum* (something given in payment), because this is not a pure payment, but in principle is naught more than an alienation of a thing for the satisfaction of the creditor, resting on a particular agreement: fr. 4. § 31. D. 44. 1; fr. 24. pr. D. 13. 7; Const. 4. C. 8. 45; Const. 9. C. 4. 44. See fr. 2. § 1. D. 12. 1; Const. 16. C. 8. 43.

⁴ The exceptions cannot be justified which are usually made because of fr. 24. D. 42. 8. and fr. 6. § 2. D. 42. 5, that the action *Pauliana*, in consequence of a payment made by the debtor, should at least be permitted when the debtor by that payment exercised an especial favor towards the satisfied creditor, to the disadvantage of other equally vigilant creditors: *Spangenberg*, Prakt. Erört. Vol. 1, p. 457. Only the fiscus was under such circumstances authorized to contest such payment, fr. 18. § 10. fr. 21. D. 49. 15, but not the other creditors, even if the paid creditor knew that the debtor's object was to favor him.

⁵ fr. 6. § 5. fr. 22. D. 42. 8; *Spangenberg*, p. 459.

1. For those creditors who are injured by the alienation; and it may be also instituted in their names by the curator of the property.¹

2. In general it can be instituted only against him with whom the debtor contracted, and even if the alienation were a gift, without distinction whether the same were in good or bad faith; if, on the contrary, the alienation were onerous, only then when the acquirer acted in bad faith.² Against a third party possessor of the alienated thing, it can be instituted only when he in the acquisition acted in bad faith.³

3. It proceeds for the dissolution of the transaction and the restitution of the thing with all its accessories. If the defendant acted in bad faith, he is liable for all the fruits, even for those which he might have reaped, and also for the entire interest, even if he cannot restore the thing itself with the fruits.⁴ If the defendant acted in good faith, then he must also restore the thing, if he still possess it, in addition to the fruits growing at the time of the acquisition and received after the institution of the action, but otherwise he is only answerable so far as he was enriched.⁵

4. By the Roman law the action only endured for one juridical year.⁶ After the expiration of this term it could be instituted only against the defendant so far as he was enriched by the debtor's fraud; and in this respect it endures by the Justinian law thirty years.⁷

5. At the time of the procedure by interdicts instead of the *Pauliana* action one could also employ a restituting interdict, which was termed *fraudatorium*. But perhaps at that time the *Pauliana* action may have been generally preferred, and in the Justinian law the learning of the *interdictum fraudatorium* has no longer practical value.⁸

SECTION FOURTH.

OF THE ENDING OF OBLIGATIONS.⁹

OF THE DIFFERENT CLASSES OF ENDINGS.

§ 529. The terms ending and dissolution of an obligation contemplate the notion of a subsequent event which extinguishes an existing obligation. But

¹ fr. 1. pr. D. 42. 8.

² fr. 1. pr. § 2. fr. 6. §§ 8. 11. fr. 17. § 1. D. 42. 8; Const. 5. C. 7. 75.

³ fr. 9. D. 42. 8. Only the *fiscus* may institute it against the third party possessor in good faith, without distinction whether he acquired the thing lucratively or onerously: fr. 45. pr. D. 49. 14.

⁴ fr. 10. § 19-22. D. 42. 8.

⁵ fr. 6. § 11. fr. 25. § 1. D. 42. 8.

⁶ fr. 1. pr. fr. 6. § 14. D. 42. 8.

⁷ fr. 10. § 21. D. 42. 8.

⁸ This appears by the seldom and more casual than systematic mention of it in the *Corpus juris*: fr. 67. § 1. D. 36. 1; fr. 96. pr. D. 46. 3. See fr. 10. D. 42. 8.

⁹ Inst. 3. 29. (30); *Donellus*, *Comm. jur. civ.* Lib. 16; *Hummel*, *Über die Arten Verbindlichkeiten aufzuheben*, Gießen, 1804.

there are cases in which a subsequent event gives the debtor only the right to claim that an existing obligation shall be invalidated.¹ In cases of the first kind, which include payment (*solutio*), novation (*novatio*) and acceptilation (*acceptilatio*), the Romans say that the obligation ceases *ipso jure*. In cases of the second kind, which include the pact of non-enforcement (*pactum de non petendo*) (§ 542, *infra*), they say that the obligation is barred by an exception;² the distinction in these two classes of cases being that in the latter the debtor can be sued on the claim arising from the obligation to which he must plead his exception to establish his non-liability, judicially, while in the former this was unnecessary, as the right of action no longer existed. This distinction appears less in the *bonæ fidei* actions in the procedure *per formulam*, because in those actions the defendant need not specially petition the magistrate for the exceptions (note 1, p. 182, *supra*), and since the repeal of the *formulae* it appears still less frequent (end of § 216, *supra*). But it does not entirely cease in the Justinian law, and still less does the distinction cease, as is shown by the manner of the ending of these two classes of obligations, that is, an obligation which has been dissolved *ipso jure* cannot be subsequently revived,³ while in an obligation which was barred or suspended events may happen in consequence of which the exception becomes invalid or through which a replication may be founded, so that the old obligation which continually existed may again become fully valid.⁴

I. PAYMENT (*solutio*).

A. NATURE.

§ 530. Payment,⁵ in its harrow sense,⁶ is the giving something to or performing something for a creditor, who accepts what forms the object of the obligation.⁷

B. REQUISITES FOR PAYMENT.

1. With respect to Persons.

§ 531. Every payment, to be valid and effectual, in regard to persons requires—

¹ *Hummel, supra*; *Dabelow, Handbuch*, Vol. 1, § 94, *seq.*

² See, e. g., *Gaius*, III. § 163–181; IV. §§ 116, 117; § 2–5. I. 4. 13.

³ However, a new one may be founded: fr. 27. § 2. D. 2. 14; fr. 72. pr. D. 18. 1.

⁴ fr. 95. § 2. D. 46. 3; *Gaius*, IV. § 126; pr. I. 4. 14; fr. 22. § 1. D. 44. 1; fr. 4. § 4. D. 2. 11; fr. 12. D. 46. 2.

⁵ Dig. 46. 3; Cod. 8. 43; pr. I. 6. 29. (30); *Donellus*, Comm. jur. civ. Lib. 16, c. 9–12; *Wendner*, Die Lehre von der Zahlung und Angabe an Zahlungsstatt, Jena, 1709; *Dubous*, Diss. de solutione, Lovan. 1826; *Koch*, Recht der Ford. Vol. 2, p. 558, *seq.*; *Unterholzner*, Schuldverh. Vol. 1, p. 460, *seq.*; *Molitor*, Les obligations, T. 3, p. 195, *seq.*

⁶ Payment, in a wide sense, signifies every dissolution of an existing obligation, regardless of the manner in which it was produced: fr. 54. D. 46. 3; fr. 176. D. 50. 16.

⁷ fr. 176. D. 50. 16; fr. 49. D. 46. 3. At the present day *solutio* is usually translated payment; but this term is too narrow, because this usually only presents the idea of payment of a pecuniary debt.

1. That he who pays is authorized to alienate,¹ subject to this condition: a performance by a third person for the debtor and payment accepted by the creditor is valid, even if it were against the debtor's knowledge and will, if made with the view to release him.²

2. It must be performed to or for the actual creditor or his authorized agent;³ this is also subject to the condition that the creditor is authorized to alienate, because the acceptance of payment contains in itself an alienation,⁴ as thereby an existing obligation ceases.

2. With respect to the Object.

§ 532. In relation to the object of the payment—

1. That must be precisely done which forms the object of the claim, as the creditor need not generally receive, against his will, one thing instead of another to which he is entitled. If, however, the debtor have a sum of money to pay, and, being pressed by his creditor, cannot pay it, he is permitted to propose his best property to his creditor in lieu of payment, and, after judicial appraisement, to surrender it to him for his satisfaction. This is termed the *beneficium dationis in solutum*.⁵

¹ § 2. in fin. I. 2. 8; fr. 14. § 8. D. 46. 3; fr. 29. D. 12. 6; Weber, Von der nat. Verb. § 128.

² pr. I. 3. 29. (30); fr. 8. § 5. D. 46. 2; fr. 23. 40. 53. D. 46. 3.

³ It can also be performed to or for the *solutionis causa adjectus*. Thus is designated the third person, to whom, according to the terms of the convention by which the claim was contracted, payment may be made without his being the creditor. Payment may also in general be validly made to him against the creditor's will, but not to an ordinary mandatary: § 4. I. 3. 19. (20); fr. 131. § 1. D. 45. 1; fr. 98. § 5. D. 46. 3; Vangerow, *supra*, Rem. 2; fr. 39. D. 3. 5; fr. 12. pr. fr. 32. fr. 34. § 7. fr. 38. § 1. fr. 59. D. 46. 3. When the payment is made to a third person the debtor becomes immediately released, if the creditor previously agreed to the payment or subsequently ratified it: fr. 49. 58. 64. D. 46. 3. Respecting the special case of payment to a creditor of the creditor, see fr. 11. § 5. D. 13. 7. and fr. 6. D. 44. 4; Vangerow, § 582, Rem. 1.

⁴ fr. 15. D. 46. 3; § 2. I. 2. 8. The guardian requires, besides this, the authority of the court, which the debtor must pray for, to entitle him to the receipt of the capital and the collection of the interest, if it were in arrear more than two years or exceeded the sum of 500 *solidi*: Const. 25. 27. C. 5. 37; and thereon see § 229, note 7, *supra*.

⁵ fr. 2. § 1. D. 12. 1; Gaius, III. § 168; pr. I. 3. 29. (30).

1. Respecting *datio in solutum*, see Const. 16. 17. C. 8. 43; Novel 4. cap. 3; Blumenthal, Diss. de datione in solutum, Göttingen, 1830.

2. Respecting the case when one owes a number of debts and pays on account without specification, see fr. 1-8. fr. 89. § 2. fr. 97. fr. 103. D. 46. 3; Const. 1. C. 8. 43; Unterholzner, Schuldverh. Vol. 1, p. 463, *seq.*; Vangerow, § 589. Respecting the case when payment is made from the sale of the pawn: fr. 73. fr. 96. § 3. fr. 97. fr. 106. § 1. D. 41. 3; fr. 55. D. 46. 1; Cujas ad L. 101. § 1. D. de solut., in his Recitt. ad Paulum (Oper. post. T. 3. pp. 92. 93); Idem ad L. 96. § 3. D. de solut., in ejusd. Comm. ad Papiniani resp. Lib. 11 (Ibid. T. 1. p. 518); Weber, Von der nat. Verb. § 128.

2. The debt must be fully paid, otherwise the debtor will not be wholly released. Nor need the creditor generally accept the payment in installments;¹ and if he voluntarily accept them or must accept them his legal remedy for the balance is not postponed thereby. Yet this suffers an exception with those persons who have the benefit of competence (*beneficium competentiæ*),² or who, as the Romans express it, are only condemned to the extent of their ability to perform (*in id, quod facere possunt*). From these the creditors can only require such payment of their debts as not to deprive them of necessary subsistence.³ This right is in its nature highly personal, and therefore vests neither in the heirs⁴ nor in the surety of the debtor,⁵ but appertains to husband and wife between themselves;⁶ to parents in relation to their children;⁷ to members of a partnership between themselves in relation to the indebtedness of one partner to another growing out of the partnership;⁸ to the father-in-law, because of the promised *dos*, so long as the marriage continues, in relation to the son-in-law;⁹ to soldiers;¹⁰ to the donor who has been sued for the fulfillment of a gift;¹¹ to him who surrendered the whole of his property to his creditors, in relation to that which he subsequently acquires;¹² to him who but recently was released from paternal control, in relation to the debts which he contracted during such control, if he inherited but little or naught from his father.¹³

3. The payment must be made at the proper time and place. If aught were determined respecting the place,¹⁴ this continues so, but if not, then the

¹ fr. 41. § 1. D. 22. 1; *Savigny*, Obl.-Rechts, Vol. 1, p. 322.

² *Dabelow*, Vom Concurse, p. 159-178, pp. 506, 516; *Unterholzner*, Schuldverh. Vol. 1, p. 181, *seq.*

³ Originally this benefit of a right consisted in that the judgment had to be limited to the property which the debtor had at that time; but in course of time it came to this, that he remained indebted for the balance, and if he again acquired property must pay therewith, and then followed that he need not surrender all of his present property, but might retain so much of it as was necessary for his support: fr. 82. D. 35. 2; fr. 21. D. 42. 1; fr. 49. D. 2. 14; § 37. I. 4. 6; Theophil. ad h. l.; fr. 19. § 1. D. 42. 1; fr. 173. pr. D. 50. 17.

⁴ fr. 25. D. 42. 1.

⁵ fr. 24. pr. D. 42. 1; fr. 63. § 1. D. 17. 2.

⁶ fr. 20. D. 42. 1; § 37. I. 4. 6; Const. un. § 7. C. 5. 13.

⁷ fr. 16. in fin. D. 42. 1; § 38. I. 4. 6. Formerly it was often allowed to the brothers and sisters, arg. fr. 63. pr. D. 17. 2, because of the words *jus fraternitatis*.

⁸ fr. 63. pr. cit.; fr. 16. 22. § 1. D. 42. 1; § 38. I. 4. 6; *Glück*, Comm. Vol. 15, p. 428, *seq.*

⁹ fr. 21. 22. pr. D. 42. 1. On a divorced marriage, see fr. 84. D. 23. 3.

¹⁰ fr. 6. pr. fr. 18. D. 42. 1.

¹¹ fr. 19. § 1. D. 42. 1.

¹² fr. 4. 6. 7. D. 42. 3; § 40. I. 4. 6. He has not this benefit of a right against those to whom he first became indebted after the cession: § 40. I. 4. 6; Theophil. ad h. l.; Const. 3. C. 7. 72.

¹³ fr. 2. pr. D. 14. 5; fr. 49. D. 42. 1; Const. 2. 9. C. 4. 26.

¹⁴ § 33. I. 4. 6; Dig. 13. 4; Cod. 3. 18; *Unterholzner*, Schuldverh. Vol. 1, p. 222, *seq.*; *Savigny*, System, Vol. 8, § 370; Oblig.-Recht, Vol. 1, § 49. On fr. 8. 10. D. 13. 4, see *Glück*, Comm. Vol. 13, p. 341.

payment may be made or required at any convenient place;¹ but if suit were instituted, then only where it was instituted.² If the claim be for a distinct kind, then, generally, it need only be fulfilled where that kind is without the fraud of the defendant.³

C. EFFECT OF PAYMENT.

§ 533. The effect of payment is the extinguishment of the creditor's claim, and all accessorial rights thereto which served only for its security cease, especially pledges and suretyship.⁴

D. PROOF OF PAYMENT.

§ 534. He who alleges the payment of what he was indebted must, if it be denied, prove it. This proof may be shown by all proper evidence, namely, by witnesses,⁵ oath, and especially by acquittances (*apochæ*).⁶ If the acquittance be drawn by a public officer, then it proves itself; if, on the contrary, it be a private one, then it has the power of full proof only after the lapse of thirty days; till then he who gave it may oppose it by the exception *non solutæ pecuniæ*.⁷ If he who has to pay public taxes exhibit acquittances for the last three years, he need not prove that he paid the taxes for the preceding years.⁸

II. LEGAL DEPOSIT.

§ 535. On tender and the consequent deposit of the money indebted.

1. If the creditor, without cause, refuse to accept the tender by the debtor of the money due, made in a proper manner and at the right time and place, then the debtor may legally deposit it. This deposit then takes the place of payment, and, like it, ends the claim;⁹ and it generally depends on the debtor's will; but it is necessary to stop the running of that interest which is not for delay.¹⁰ The debtor also retains the right to retake the sum deposited so long as it has not been received by the creditor, and thereby revive his previous obligation for the debt in every particular, especially in regard to interest.¹¹

2. Both tender and deposit are generally requisite to release the debtor from his debt, but there are cases when one or the other is sufficient, which include—

¹ fr. 39. D. 46. 3.

² fr. 47. pr. § 1. D. 30; fr. 38. D. 5. 1; fr. 22. D. 12. 1.

³ fr. 38. D. 5. 1; fr. 11. § 1. D. 10. 4; fr. 12. § 1. D. 16. 3. See fr. 10–12. D. 6. 1.

⁴ pr. I. 3. 29. (30); fr. 43. D. 46. 3; *Donellus*, Comm. jur. civ. Lib. 16, c. 12, 26.

⁵ If, however, the debtor had executed a written acknowledgment of his debt, and without having received an acquittance attempts to prove payment by witnesses, then five are required: Const. 18. C. 4. 20; Novel 90. c. 2.

⁶ Cod. 10. 22; Novel 90. c. 2. On the question, Can the debtor demand an acquittance? see Const. 18. C. 4. 20; Const. 19. C. 4. 21; Const. 1. § 2. C. 10. 22.

⁷ Const. 4. C. 10. 22; Const. 14. § 2. C. 4. 30.

⁸ Const. 3. C. 10. 22.

⁹ Const. 9. C. 8. 43. See fr. 72. pr. D. 46. 3; Const. 19. C. 4. 32; *Schultz*, Tract. de oblatione, Bremen, 1775; *Tidemann*, Diss. de depositione, Göttingen, 1776.

¹⁰ fr. 7. D. 22. 1; Const. 6. 9. 19. C. 4. 32; Const. 9. C. 8. 43.

¹¹ Const. 8. C. 8. 28; Const. 19. C. 4. 32.

a. When one is to pay a certain interest, but in case he should not pay on a certain day promised to pay higher interest; here the simple tender discharges him from the injurious consequences of the delay.¹

b. When the debtor cannot safely pay the creditor—*e. g.*, because he is a minor and has no guardian, or because the judge has enjoined the creditor's claim, or because several contend for it—then the simple deposit suffices to discharge the debtor from the debt.²

III. COMPENSATION.³

§ 536. When two persons are mutually indebted to each other—money or other things of the same kind which depend on quantity⁴—and the one juridically demands an account, then their mutual claims are extinguished with the effect as if at the moment when they first opposed each other and were due they were both paid.⁵ If the claims and counter-claims are fixed at an

¹ fr. 9. § 1. D. 22. 1; Const. 9. C. 5. 32. ² fr. 7. § 2. D. 4. 4; fr. 18. D. 22. 1.

³ Dig. 16. 2; Cod. 4. 31; §§ 30. 39. I. 4. 6; Paul, II. 5. § 3; *Donellus*, Comm. jur. civ. Lib. 16, c. 15; *C. Einert*, Pr. de compensat. spec. 1, Leipzig, 1830; *Krug*, die Lehre von der Compensation, Leipsic, 1833; *Brinz*, die Lehre von der Compensation. Leipsic, 1849; *Koch*, Recht der Ford. Vol. 2, p. 627, *seq.*; *Dernburg*, Die Compensation nach R. R., Heidelberg, 1854.

⁴ *Valett*, Abhandl. No. 3, contends that according to Justinian law (Const. ult. C. 4. 31) compensation also takes place with such claims as are for dissimilar objects.

⁵ fr. 1. 3. D. 16. 2; Const. 4. 14. C. 4. 31. From the history of compensation at the time of Gaius it appears that the money-broker (*Argentarius*) must admit compensation in claims made by him, and the *bonorum emtor* (§ 520, *supra*) must claim less the cross-claims: Gaius, IV. § 64–68; besides which, he who instituted a *bonæ fidei* action must allow the deduction of the counter-claim out of the same transaction (*ex eadem causa*) without the judge being thereto especially instructed: Gaius, IV. §§ 61. 63. Since Marcus Aurelius, § 30. I. 4. 6, or even earlier, fr. 4. 5. 10. § 3. fr. 15. D. 16. 2, in *stricti juris* actions, and even in other actions which are not *bonæ fidei*, the compensation from counter-claims, which here could only arise *ex dispari causa* (*i. e.* not out of the same transaction), could be attained by means of the exception of fraud. From that time on, also in the *bonæ fidei judicia*, counter-claims *ex dispari causa* could naturally be compensated. See Paul, II. 5. § 3; Theophil. ad § 30. I. 4. 6. Justinian finally, in the Const. 14. C. 4. 31, extended compensation more to real actions than theretofore, and prescribed some other matters whose interpretation is disputed. Passages which treat particularly of the money-broker are not incorporated in the Corpus juris. Monographs on questions arising from the doctrine of compensation are—

1. *Weber*, on the plea of Compensation and the legal remedies whereby the defendant can actionably pursue his counter-claim, in his *Beiträgen zu den Klagen und Einr. St.* 1, p. 59; *Schuster*, Wie ist das Compensationsrecht geltend zu machen? Vienna, 1829; *Krug*, §§ 9. 11, 20, 23, 24, 30, 31.

2. On the question if and when the judge may refer the *illiquid* (incapable of being set-off) exception of compensation to an especial result, see *Krug*, § 89, *seq.*; *Brinz*, p. 151, *seq.*, *supra*.

3. On the allowance of compensation in competition by creditors, *Dabelow*, Vom Concourse, p. 685–708.

equal sum or quantity, then both are wholly extinguished; but if, on the contrary, the sums are different, then the greater claim is only so far extinguished as it is covered by the lesser opposing it.¹ How the claims arose is immaterial, and even a moral obligation (*naturalis obligatio*) may be used for compensation, but not a claim wholly repudiated by law.² Compensation for valid claims may be made by heirs, sureties, cedors and cedees;³ but, exceptionally, compensation cannot be made, even if the other requisites exist, when it has been forbidden, when one has become indebted to the fiscus for taxes or purchase-moneys,⁴ when a depositor has been sued in the action for deposit,⁵ and in the case of an illegal taking of possession.⁶

IV. NOVATION.

A. IDEA.

§ 537. Novation,⁷ by the Roman law, is the dissolution⁸ of an existing obligation by a conversion of it into a new verbal obligation (*verborum obligatio*); for which is now requisite—

1. That in the form of stipulation⁹ he express his assent who by novation desires to enter into a new obligation.¹⁰

4. *H. L. Weber*, Can he who promises with an oath to pay release himself therefrom by the pretext of compensation? Rostock, 1793.

5. *Gesterding*, on the allowance of compensation in real actions, in his *Nachforschungen*, Pt. 3, p. 173.

6. *Cappel* (Pr. Alb. Phil. Frick), Diss. an compensatio obstat præscriptio? Helmstedt, 1794.

¹ Const. 4. C. 4. 31. See §§ 30. 39. I. 4. 6.

² fr. 6. fr. 14. D. 16. 2.

³ fr. 4. 5. 16. pr. fr. 18. pr. D. 16. 2.

⁴ fr. 46. § 5. D. 49. 14; Const. 7. C. 4. 31.

⁵ § 30. I. 4. 6; Const. 14. § 1. C. 4. 31; Const. 11. C. 4. 34.

⁶ Const. 14. § 2. C. 4. 31.

⁷ Gaius, II. §§ 38. 39; III. § 176–179; § 3. I. 3. 29. (30); Dig. 46. 2; Cod. 8. 42; *Donellus*, Comm. jur. civ. Lib. 16, cap. 20; *Kopp*, Über die Novation, Hanau, 1811; *Unterholzner*, Schuldverh. Vol. 1, p. 621, seq.; *Koch*, Die Lehre von dem Uebergang der Forderungsrechte, Breslau, 1837.

⁸ The moderns distinguish between cumulative novation and privative novation, according as the existing obligation continues and is only strengthened, *e. g.*, by oath or conventional penalty, or whether it be dissolved and another take its place. The Romans never termed the former *novatio*, but each novation was with them always privative in the modern sense.

⁹ fr. 1. § 1. fr. 2. D. 46. 2; *J. C. Hasse*, Diss. An novatio voluntaria, Kilon, 1811. By the ancient law the same was also effected by writing (*litteræ*) (§ 456, *supra*). However, the term *novatio* in our sources perhaps casually was not used for it. In novation at the present day it does not depend on the form of stipulation, and hence by novation is now understood every convention whereby an existing obligation is dissolved and another is put in its place.

¹⁰ Const. 1. 6. 8. C. 8. 42. Every novation is therefore, at least according to the more modern law, a *voluntaria*. In the meanwhile the division into novation

2. That the intention to novate (*animus novandi*) be expressly declared; otherwise two obligations would exist, the old and the new.¹

3. That there be an actual existing obligation which will be novated, of which kind is immaterial.²

4. That the new promise be valid; because, if it be invalid, then the old claim would be dissolved by novation without a new one taking its place.³

B. VARIOUS KINDS OF NOVATION.

§ 538. A novation may take place in various ways, namely:

A. Either when the debtor and the creditor remain the same—this is the case when the consideration for the obligation is altered by another object being substituted instead of the one promised,⁴ and when the collateral stipulations of the debt respecting the time, place, condition, surety, etc., are changed⁵—

B. Or when a new debtor takes the place of the old debtor; and this, again, may occur in two ways:

1. Either through the simple stipulation of the creditor with the new debtor without requiring the assent of the old debtor thereto—this is now termed *expromissio*⁶—

2. Or by the former debtor transferring his debt to another whom the creditor accepts instead of the former. This is termed *delegatio*, to which the assent of the creditor, as well as that of the old and new debtor, is requisite.⁷

C. Or by a new creditor taking the place of the old one, by the former creditor transferring his claim to another whom the debtor recognizes as his

necessaria and *voluntaria*, according to the older Roman law, in a certain sense may be justified. The former was a consequence of the *litis contestatio* and *res judicata* (p. 184, *supra*, note 2, *seq.*): *Fragm. Vat.* § 263; *fr.* 11. § 1. *fr.* 29. D. 46. 2; *Ribbentrop*, *Diss. de novatione necessaria*, Gottingen, 1825; *Keller*, *Über Litis-Contestatio*, Zurich, 1827, p. 88, *seq.* On the effect of the *litis contestatio* which formerly could be deduced from the novation *necessaria*, and which may now occur according to the Justinian and present law, see *Savigny*, *System*, Vol. 6, pp. 277, 307.

¹ *fr.* 2. *fr.* 8. §§ 2. 5. *fr.* 28. D. 46. 2. Especially *Const.* 8. C. 8. 42, whereby Justinian declares invalid every *novatio tacita et præsumta* otherwise valid. See also § 3. I. 3. 29. (30); *Theophil.* ad § 3. I. 3. 29. (30).

² *fr.* 1. § 1. D. 46. 2. However, one may also novate through such others as through whom one may stipulate: *fr.* 20. D. 46. 2; *Paul.* V. 8.

³ § 3. I. 3. 29. (30); *fr.* 20. § 1. D. 46. 2; *Gaius*, III. § 176.

⁴ *fr.* 58. D. 45. 1; *fr.* 9. § 2. D. 46. 2.

⁵ In relation to condition and suretyship, it was much disputed among the ancient jurists if and when a novation existed: *Gaius*, III. § 177–179; *fr.* 8. § 1. *fr.* 14. *pr.* § 1. D. 46. 2. But Justinian decided that this must depend on the expressly declared will of the parties: *Const.* 8. C. 8. 42; § 3. I. 3. 29. (30).

⁶ *fr.* 8. § 5. D. 46. 2; *Const.* 25. C. 2. 3. As the *expromissio* is a kind of intercession, hence females cannot validly *expromissio* (§ 451–455, *supra*).

⁷ *fr.* 11. 17. D. 46. 2; *Const.* 1. 6. C. 8. 42.

creditor. This is also termed *delegatio*, and is distinguished from the *cessio nominis* (cession of the claim) in that the debtor must co-operate therein and that the former obligation thereby ceases.¹

C. EFFECT OF NOVATION.

§ 539. The effect of novation is to extinguish the old obligation with all of the accessory rights,² and a new one takes its place, which, by the Roman law, is a verbal obligation that may be enforced by an action *ex stipulatu*.³ A consequence of which is—

1. That by the *expromise* and delegation of a debt the old debtor is released, even if the new debtor be or become incapable of payment, unless the creditor had expressly reserved to himself for this case recourse against the old debtor.⁴ Neither the *expromissor* nor the *debitor delegatus* can use the defences against the creditor which he had against the old debtor or the debtor had against the creditor.⁵

2. As also in the delegation of a claim, the new creditor, in the event that he cannot obtain payment from the debtor without express reservation, has no recourse against the old creditor; but he is not subject to those defences which the debtor might have set up against the old creditor.⁶

V. REMISSIONAL CONVENTIONS.

A. ACCEPTILATION.

§ 540. Acceptilation is the annulment by stipulation of an obligation⁷ arising by stipulation.⁸ An obligation founded by stipulation can be annulled by acceptilation only;⁹ but every debt may be converted by novation into a verbal obligation and then be annulled by acceptilation.¹⁰ For the case where

¹ Const. 3. C. 8. 42; Const. 2. C. 4. 10; *Mühlenbruch*, Von der Cession, p. 225.

² However, the pawn given for the extinguished debt and its priority in the novation of the new debt may be reserved: fr. 29. D. 46. 2.

³ fr. 1. pr. fr. 15. fr. 18. D. 46. 2; § 3. I. 3. 29. (30).

⁴ § 3. I. 3. 29. (30); fr. 45. § 7. D. 17. 1.

⁵ fr. 12. 13. 19. D. 46. 2.

⁶ Const. 3. C. 8. 42. This is otherwise in the simple cession. See *supra*, § 368.

⁷ fr. 35. fr. 153. D. 50. 17; fr. 30. D. 46. 3.

⁸ Dig. 46. 4; Cod. 8. 44; § 1. I. 3. 29. (30). Its name is derived from the creditor's answer to the debtor's question: That which I have promised to you, do you regard it as received (*Quod tibi spopondi habesne acceptum*)? I so regard it (*Acceptum tuli*): Gaius, III. 169.

⁹ fr. 8. § 5. D. 46. 4. See also note 7. The obligation entered into through the former *nexum* (p. 334, note 1; end of § 518, § 519, *supra*) could only be dissolved by weight and scales (*per aes et libram*): Gaius, III. § 173–175. In which form the former obligation by writing out of the *transcriptitiam nomen* could be dissolved we have no information. But if it arose from a double entry in the cash book (note 1, p. 351, *supra*), then it could not otherwise be dissolved than by a double entry, namely, by an *acceptilatio* and a contemporaneous *expensilatio*, so that it appeared as if the debtor had paid and then the sum paid had been returned to him as a gift.

¹⁰ § 1. I. 3. 29. (30).

a number of debts could at once be annulled by acceptilation the jurist Gallus Aquilius composed a general formula by which they were jointly converted first by novation into a verbal obligation and then annulled by acceptilation. This is termed *stipulatio Aquiliana*.¹

B. CONTRARIUS CONSENSUS S. DISSENSUS.

§ 541. The *contrarius consensus s. dissensus* consists in that two pactors agree that an obligation founded on a simple agreement between them shall be annulled.² This, however, is only possible so long as the obligation is unperformed by either side (*rebus integris*); for if the new agreement be after the performance of the former obligation, then it is not only thereby annulled, but a new obligation is founded.³

C. PACT OF NON-CLAIM (*de non petendo*).⁴

§ 542. The simple convention whereby the creditor promises the debtor that he will not enforce his claim is termed *pactum de non petendo* or *pactum ne petatur*. It generally⁵ creates only a dilatory exception⁶ when it is agreed on only for a certain time, and a peremptory exception when agreed for perpetually.⁷

VI. CHANGE OF CIRCUMSTANCES.

A. CONFUSION.

§ 543. An obligation sometimes ceases because the circumstances without which it would not have been created have changed. That is termed confusion when two persons, whose divided position is requisite for the continuance of a debt, become one person, *e. g.*, when one becomes the heir of the other. If such a confusion should happen between creditor and principal debtor, then the entire obligation is thereby extinguished with all accessorial obligations;⁸ but if, on the contrary, it should happen between the principal

¹ They are found in § 2. I. 3. 29. (30) and fr. 18. D. 46. 4. See also fr. 4. D. 2. 15; Gaius, III. § 170; *Th. Fraser*, De stipulatione Aquiliana, Leyden, 1825; *C. G. Haubold*, *Fragm. Græcum de obligat. causis et solutionibus*, Leipsic, 1817.

² § 4. I. 3. 29. (30); Dig. 18. 5; Cod. 4. 45; fr. 35. D. 50. 17; fr. 30. D. 46. 3.

³ fr. 58. D. 2. 14. The former obligation in this case is dissolved by its performance *solutio*. See fr. 5. pr. § 1. D. 18. 5.

⁴ Dig. 2. 14; Cod. 2. 3; *Donellus*, *Comm. jur. civ. Lib. 22, c. 4*; *Steger*, *Diss. de natura et indole pacti de non petendo*, Leipsic, 1727; *Weber*, *Von der nat. Verb. § 128*; *Glück*, *Comm. Vol. 4, p. 219*. On agreements respecting abatements in competition of creditors, see § 522, note 1, p. 391, *supra*.

⁵ It exceptionally is dissolved *ipso jure* if it treat either concerning a moral obligation (*naturalis obligatio*), fr. 95. § 4. D. 46. 3, or of the action for theft or wrongs, fr. 17. § 1. D. 2. 14, and the convention be perpetual.

⁶ Gaius, IV. § 116; § 3. I. 4. 13; fr. 21. 27. 32. D. 2. 14.

⁷ Gaius, IV. § 129-122; §§ 9. 10. I. 4. 13. See *Savigny*, *Obl.-Recht*, Vol. 1, p. 178.

⁸ fr. 75. fr. 95. § 2. fr. 107. D. 46. 3; fr. 71. pr. D. 46. 1.

debtor and one bound for the accessorial obligations, or between the latter and the creditor, then only the accessorial obligations are extinguished.¹

B. CASUAL DESTRUCTION OF THE OBJECT OF THE DEBT.

§ 544. In the casual destruction of the thing which forms the object of the claim² there are the following distinctions:

1. If the claim were for a certain object which perished by casualty or ceased to exist without the debtor's fault or before he was in delay in its delivery, then he becomes released from his duty without performance.³

2. If, on the contrary, the claim were in the alternative for one thing or another—

a. Then the debtor only becomes wholly released when all the objects are destroyed and the casualty can in nowise be attributed to him.⁴ If only one be destroyed, then the remaining ones must be given.⁵

b. If the destruction were caused by the debtor's wrong or delay, then, if all of the objects were thereby destroyed, he must pay the creditor therefor in accordance with his claim. But if one remain, then the creditor, who has the right of election, can demand this or the value of the perished object. But if it were the creditor's fault, then the debt, after the destruction of one of the promised alternative things, generally attaches to the other.⁶

C. CONCURRENCE OF TWO LUCRATIVE CAUSES OF ACQUISITION.

§ 545. If one has a claim for a thing for the purpose of gain, his claim becomes extinguished if he acquire the same thing in another way for a similar purpose of gain.⁷

VII. DISPOSITION BY LAST WILL, OATH, LEGAL ADJUDICATION AND PRESCRIPTION.

§ 546. Finally, all obligations may be dissolved by testamentary dispositions,⁸ by oaths (§ 475, *supra*) and by legal adjudication,⁹ and the actions on obligations may be extinguished like other actions by prescription, which has already been treated in §§ 213, 215, *supra*.

¹ fr. 43. fr. 93. §§ 2. 3. D. 46. 3.

² But not when a class or a quantity forms the object of the claim, *e. g.*, Const. 11. C. 4. 2.

³ fr. 23. D. 45. 1. See fr. 82. § 1. D. 45. 1; fr. 15. § 3. D. 6. 1; fr. 14. § 1. D. 16. 3; fr. 20. D. 13. 1; fr. 5. § 2. D. 18. 5.

⁴ fr. 34. § 6. D. 18. 1.

⁵ fr. 2. § 3. D. 13. 4.

⁶ fr. 95. pr. § 1. D. 46. 3; fr. 105. D. 45. 1.

⁷ fr. 17. D. 44. 7; fr. 83. § 6. D. 45. 1. An example appears in § 6. I. 2. 20; *Sell*, Über die römisch-rechtl. Aufhebungsart der Obligationen, Zürich, 1839.

⁸ By a legacy of the debt (*legatum liberationis*): fr. 1. pr. D. 34. 3. See *infra*, § 764.

⁹ fr. 1. D. 42. 1; fr. 43. D. 12. 6. joined with fr. 2. D. 12. 2; arg. fr. 56. D. 42. 1; fr. 207. D. 50. 17.

THIRD BOOK.

DOMESTIC RELATIONS AND THEIR INFLUENCE ON PROPERTY.

GENERAL VIEW.

§ 547. The family relations, with their influence on property, which will be here treated, are marriage, paternal power and guardianship.¹

SECTION FIRST.

OF MARRIAGE.

SOURCES.—In general: Inst. 1. 10; Dig. 23. 2; Cod. 5. 4. (Decretal 4. 1; Lib. Sext. Decretal 4. 1; Conc. Trident. Sess. 24.)

LITERATURE OF THE ROMAN MARRIAGE LAW.—*Hotomanus*, De veteri ritu nuptiarum et jure matrimoniorum, Lyons, 1569, et in *Graevii*, Thesaur. T. 8. p. 1112, *seq.*; *Brissonius*, De ritu nuptiarum et de jure connubii, in his minor works, ed. *Treckell*, p. 285–288; *Brouwer*, De jure connubiorum, 2d ed. Delph. 1714; *Gruppen*, De uxore Romana, Hanover, 1727; *Ayrer*, De jure connubiorum apud Romanos, Göttingen, 1736; *Dornaeiffen*, De jure feminarum apud Romanos, ed. noviss., Utrecht, 1818; *Bethmann-Hollweg*, De causarum probatione, Berlin, 1820, cap. 1; *Gans*, Scholien zum Gaius 2d and 3d Scholie; *Wächter*, Über Ehescheidungen bei den Römern, Stuttgart, 1822; *Hasse*, Das Güterrecht der Ehegatten nach R. R. 2 vols., Berlin, 1824–1832; *Glück*, Comm. Vol. 23. § 1205, *seq.*; *Zimmern*, Röm. R. G. Vol. 1, § 132–178; *Tafel*, Comm. de divortiis apud Romanos, cap. 1, de variis nuptiarum generibus apud Romanos, Oeringa, 1833; *Roszbach*, Untersuch. über die Römische Ehe, Stuttgart, 1853. See also, particularly, *Walter*, Lehrbuch des Kirchenrechts, § 294, *seq.*

CHAPTER I.

OF THE NOTION OF AND THE ENTERING INTO MARRIAGE.

I. NOTION OF MARRIAGE.

§ 548. Marriage is an obligation entered into between two persons of different sexes having for its object the exclusive and undivided community of the whole lives of both husband and wife;² hence marriage does not consist so much in the physical union of the sexes as in the intended union for the whole lives of the husband and wife. In this *animus* for the entire union of

¹ These heads are generally termed family law. On the relation of the family law to the law of persons or the doctrine of persons in the sense of the Roman institutional system, see §§ 234, 235, *supra*.

² *tr.* 1. D. 23. 2; § 1. I. 1. 9. See Const. 4. C. 9. 32; Decret. Gratiani, C. 27. qu. 2; *Walter*, *supra*, § 518; *Hasse*, *supra*, § 1–4.

life lies the distinction between the true marriage and all other union of sexes which are not true marriages, particularly concubinage.¹ Marriage and concubinage have in common that both are a union of sexes between husband and wife and that both are externally alike, at least by the Roman law, in which for the entering into marriage generally no external form is requisite, but only the agreement for marriage (*consensus matrimonialis*);² but they differ in their internal form, because in marriage *animus matrimonii* exists, *i. e.*, the intention of the parties is for an entire community for the whole life and all vicissitudes of life; in concubinage this intention does not exist. The effect of each true and valid marriage is that the woman acquires the dignity of wife (*dignitas mariti*) and that the children begotten in the marriage are legitimate, *i. e.*, that the husband is juridically regarded as such, or, as the Roman law expresses it, the children have a father (*liberi patrem habent*) (§ 584, *infra*). They also come into the father's power or the power of him in whose power he is (§ 591, *infra*). In concubinage the concubine does not acquire the dignity of wife, the children begotten therein are illegitimate (*liberi quasi sine patre*) (§ 586, *infra*) and are not in the power of their begetter or of him in whose power he is.³ That marriage which has all the effect which the Roman law ordains as just and lawful marriage⁴ is an institute of the civil law, and therefore can only exist between persons who are Roman citizens, excepting when marriage was especially allowed to those who are not.⁵ Formerly there were consequences of the Roman marriage similar to the paternal power, when the wife was not *uxor tantum*, that is, had not all the rights of a full wife; she had no family rights and did not inherit to him, but was in *manu mariti*, that is, subject to the power of her husband like others in his power;⁶ but in the Justinian law the *manus* no longer appears.⁷

II. BETROTHMENT.

A. ENTRY.

§ 549. Marriage is generally preceded by a convention whereby both

¹ This was permitted by the Romans subject to certain conditions: Paul, II. 20; Dig. 25. 7; Cod. 5. 26; Glück, Comm. Vol. 28, § 1295. In Germany it was first disapproved by the imperial police order of 1530, Tit. 33, as dishonorable to the marriage institution, and was forbidden with a penalty in consequence of the Council of Trent in the Imp. Pol. Ord. of 1577, Tit. 26.

² fr. 15. D. 35. 1; fr. 30. D. 50. 17.

³ fr. 49. § 4. D. 32; § 32. I. 1. 10; Gaius, I. § 64.

⁴ Gaius, I. § 55; Ulpian, V. § 2. The children therefrom are termed *justi liberi* and the father *justus pater*: Livy, XXXVIII. 36; Gaius, I. § 77; III. § 72; Fragm. Vat. § 168, 194.

⁵ Gaius, I. § 57; Ulpian, V. § 1-5.

⁶ See *supra*, § 133, and *infra*, § 557, *seq.*; Gaius, I. § 49. § 108, *seq.*; II. § 86, *seq.*; Hase, *supra*, Vol. 1, p. 54, *seq.*, p. 129; Eggers, Über das Röm. Ehe mit Manus, Altona, 1833.

⁷ See *infra*, § 557, note 4.

parties reciprocally agree for the future entering into marriage. This is termed betrothment (*sponsalia*).¹ According to the Roman law—

1. Naught more is required for betrothment than mutual consent.² But this must be given by both parties seriously, considerably and with freedom of will. Respecting the influence of insanity, force, fraud and error on the legal operation of betrothment, the ordinary principles of conventions apply.³

2. All who are authorized to enter into a future marriage may betroth themselves,⁴ even should they not be able or authorized at the time of betrothal to enter into marriage.⁵

3. The betrothal may also be made subject to a condition into which enter the ordinary principles of the effect of conditions in general (§ 184, *supra*), and of conventions in particular (§ 392, *supra*).

B. EFFECT OF BETROTHMENT.

§ 550. The betrothal, by the Roman law, creates no action to compel the entering into marriage nor for damages because of groundless refusal to enter therein.⁶ But so long as the betrothment exists the entering into a new betrothment or a marriage with another is infamous (p. 128, note 4, *supra*). Furthermore the betrothed must be true to each other, and in some other legal relations they are placed similar to married persons.⁷ Sometimes the voluntary dissolution of a betrothment has pecuniary disadvantages. See § 551, *infra*.

C. DISSOLUTION OF BETROTHMENT.

§ 551. Betrothment is dissolved—

1. By the death of one of the betrothed.
2. If, after entering therein, an impediment to the marriage arise.
3. By agreement of both parties (usually termed *repudium voluntarium*).
4. By the withdrawal of one party alone (*repudium*, usually termed *repudium necessarium*).⁸ On the dissolution of the betrothment the betrothal gifts (*arra sponsalitia*) which the betrothed gave to each other may be re-

¹ Dig. 23. 1; Cod. 5. 1 (Decretal 4. tit. 1-5; Lib. Sext. Decretal 4. 1); *Walter*, § 311; *Gluck*, *Comm.* Vols. 22, 23, § 1190-1204; *Hartitzsch*, *Eherecht*, § 98-154.

² *fr.* 4. pr. D. 23. 1. If one or the other of the parties be under the paternal power, then the consent of the possessor of it is requisite: *fr.* 7. § 1. D. 23. 1. comp. with l. 1. 10. and Paul, H. 19.

³ *fr.* 8. D. 23. 1; Paul, H. 19.

⁴ And they who cannot enter into a future marriage cannot betroth themselves: *fr.* 60. § 5. D. 23. 2.

⁵ *E.g.* minors: *fr.* 14. D. 23. 1. So also cap. 7. 8. X. 4. 2. and *fr.* 10. § 1. D. 3. 2.

⁶ *fr.* 2. § 2. D. 24. 2; Const. 1. C. 5. 1; *fr.* 134. D. 45. 1; Const. 2. C. 8. 39. See *Gellius*, *noct. attic.* 4. 4; *Walter*, *Rechtsg.* § 520.

⁷ Const. 5. C. 5. 1; *fr.* 5. D. 22. 5; *fr.* 15. § 24. D. 47. 10.

⁸ *fr.* 101. § 1. D. 50. 16; *fr.* 38. D. 24. 3.

demanding from each party or their heirs, excepting in the causeless withdrawal of one party alone, in which case the innocent party retains the gifts and may redemand double what was given by such party, even if such party had received naught; the minor bride, however, is not subject to this penalty.¹ In the unilateral withdrawal of a betrothed it depends, according to the Roman law, whether such party has a just cause or not. A just cause exists when the other is faithless or is guilty of shameful conduct (*turpis vel impudica conversatio*), or religious differences arise between the betrothed, or the entry into marriage is delayed more than two or three years without cause.²

III. REQUISITES TO THE ENTERING INTO MARRIAGE.

A. ABSOLUTE IMPEDIMENTS TO MARRIAGE.

§ 552. For the entering into marriage it is absolutely requisite that the persons who would enter should be marriageable. Absolutely incapable for entering therein are—

1. All who are not yet corporeally mature therefor. The Roman law requires for it puberty of the man as well as of the woman.³

2. The castrated. It is usually remarked that absolute inability of procreation generally causes incapability to the entry into marriage, but the Roman law does not declare all *spudones* (impotent) incapable, but only the *castrati* (castrated).⁴

3. They who live in valid marriage cannot enter into another, because contemporaneous polygamy is forbidden,⁵ but successive is permitted; but if the marriage be dissolved by the death of the husband or by divorce, the wife must wait at least a year before she can marry again.⁶

¹ Const. 3. 5. C. 5. 1; Const. 15. 16. C. 5. 3.

² Const. 16. C. 1. 4; Const. 2. 5. C. 5. 1; Const. 2. C. 5. 17.

³ pr. I. 1. 10; fr. 14. D. 23. 1; fr. 4. D. 23. 2. The canon law requires only puberty: Tit. X. 4. 2; Lib. sext. Decretal 4. 2. Modern legislation usually requires a greater age in both sexes. Old age, on the contrary, is not an impediment to marriage: Const. 27. C. 5. 4. (cap. 4. X. 4. 15).

⁴ fr. 39. § 1. D. 23. 3; fr. 6. D. 28. 2; *Hasse, supra*, p. 33. A totally different question is, Can a marriage be dissolved because of the impotence or unfruitfulness of the one or the other party? See thereon Const. 10. C. 5. 17; Novel 22. c. 6; Novel 117. c. 12; c. 2. C. 3. qu. 1; Tit. X. 4. 15; *Bauer, Diss. de matrimonio*, Leipzig, 1823. On the present law see *Waller*, § 305, IV.

⁵ §§ 6. 7. I. 1. 10; fr. 1. D. 3. 2; Const. 2. C. 5. 5.

⁶ This is generally termed the mourning year (*annus luctus*). The true ground, however, lies in the fear of disturbance in the generation, *turbatio sanguinis s. confusio sobolis*: Const. 8. § 4; Const. 9. C. 5. 17; Novel 22. c. 16. The violation of this prescript does not annul the new marriage, at least if the former marriage were dissolved by the death of the husband, but has infamy as its consequence and a loss of property as a penalty: fr. 1. fr. 11. § 1. D. 3. 2; Novel 22. c. 2. See *infra*, § 582.

4. Monks and nuns.¹

5. All clergymen who have high positions in the church.²

B. RELATIVE IMPEDIMENTS TO MARRIAGE.

1. *Because of Kinship.*

§ 553. Presuming the ability to marry of those who would enter into marriage, it is further necessary that they be not prevented by any special lawful prohibition.³ The prohibition of the Roman law⁴ which forbade certain marriageable persons to marry among themselves is—

1. Too near kinship.⁵ For this reason marriage is prohibited—

a. Between persons who are related to each other in a direct line, absolutely and without distinction of grades, whether the kinship be natural, arising from procreation, or legal, founded on adoption, in which latter case the prohibition continues even if the tie of adoption has ceased.⁶

b. Between collaterals of the second degree and between those of whom the one is immediately and the other mediately descended from the common ancestor,⁷ what is now termed *respectus parentalis* (§ 141, *supra*, note 7). This prohibition also includes persons who by adoption have come into a relation brotherly or sisterly or similar to the *respectus parentalis* to each other, but yet only so long as the adoption continues.⁸ (On the other hand, the Roman law permits⁹ marriage between brothers' and sisters' children.¹⁰

¹ The first ordinances thereon are by Constantine's sons: Const. 1. 2. C. Th. 9. 25; Const. 5. C. 1. 3; Novel 5. c. 8; Novel 6. c. 1. § 7; Novel 123. c. 14. 29. In the heathen times the vestals were forbidden to marry till after thirty years' service: *Dirksen*, Civ. Abh. Vol. 1, p. 311, *seq.*

² This was first ordained by Justinian, who, however, permitted a married person to enter the clergy: Const. 45. C. 1. 3; Novel 6. c. 5; Novel 22. c. 42; Novel 123. c. 12.

³ *De Jonghe*, Diss. de matrimonio, Leodii, 1823 (contains a precisely compared collection of ancient and modern legislation on marriage impediments); *Harttitzsch*, Eherecht, § 30-97.

⁴ *Marens*, Diss. de nuptiis jure Romano prohibitis, Utrecht, 1811.

⁵ Gaius, I. § 58-64; Epit. Gaius, I. 4; Coll. Leg. Mos. et Rom. tit. 6; Cod. Theod. 3. 12; Inst. 1. 10; Cod. 5. 5; *Reitz*, Excurs. ad Theophilum, T. 2, p. 1183; *Schlegel*, Systematische Darstellung der Verbotene Grade der Verwandtschaft, Hanover, 1802.

⁶ § 1. I. 1. 10; fr. 53. 55. D. 23. 2.

⁷ By a *senatus-consultum* under Claudius only the marriage with a brother's daughter was permitted: Gaius, I. § 62; Ulpian, V. § 6; but was again prohibited by Constantine's sons: Const. 17. C. 5. 4; Const. 9. C. 5. 5.

⁸ § 25. I. 1. 10; fr. 17. D. 23. 2.

⁹ By the canon law marriage among collaterals to the fourth degree by canonical computation (§ 142, *supra*, note 1) is forbidden: cap. 8. X. 4. 14; *Walter*, Kirchenrecht, § 310.

¹⁰ § 4. I. 1. 10. Theophilus and with him several manuscripts read "*non possunt*." But see fr. 3. D. 23. 2, and particularly Const. 19. C. 5. 4, whereby the former pro-

2. *Because of Affinity.*¹

§ 554. Formerly, by the Roman law, only the marriage with the mother-in-law or stepmother and with the daughter-in-law or stepdaughter was forbidden;² and afterwards the marriage with the wife of the deceased brother and with the sister of the deceased wife was also forbidden.³ Besides these was the prohibition of marriage because of the quasi affinity between the husband and the daughter of his divorced wife begotten afterwards by another husband, between the father and the son's bride, between the son and the father's bride,⁴ between the stepfather and the stepson's widow, and between the stepson and the stepfather's widow.⁵

3. *For other Reasons.*⁶

§ 555. Marriage is forbidden for other reasons—

1. Because of the difference of the religion of the parties, between Jews and Christians.⁷

2. Because of crime, between the adulterer and the adulteress⁸ and between the seducer and the seduced.⁹

hibition of this marriage by Theodosius, in Const. 1. C. Th. 3. 10. and Const. 3. C. Th. 3. 12, was again abrogated.

¹ *Heineccius*, ad Legem Juliam et Pap. Popp. lib. 2, cap. 17; *Walter*, §§ 312, 313; *Göschel*, Grundr. pp. 330, 334.

² §§ 6. 7. I. 1. 10; fr. 14. § 4. D. 23. 2; fr. 4. § 5-7. D. 38. 10; Const. 17. C. 5. 4.

³ Const. 2. 4. C. Th. 3. 12; Const. 5. 8. 9. C. 5. 5. The canon law permitted it to remain thus for a long while, but afterwards it went further: Can. 15. C. 35. qu. 2; cap. 8. X. 4. 14.

⁴ § 9. I. 1. 10.

⁵ fr. 15. D. 23. 2. Stepchildren (or, as it is also expressed, children brought together, *comprivigni*) may marry each other, because there is neither consanguinity nor affinity between them. See *supra*, § 145, notes 7, 8, § 147, note 4; § 8. I. 1. 10; fr. 34. § 2. D. 23. 2.

⁶ By the canon law, besides the marriage prohibitions mentioned in § 553-555, *supra*, there are several others: it distinguishes between *impedimenta dirimentia*, whereby the marriage already entered into is annulled, and *impedientia*, whereby the entering into marriage is only temporarily hindered; if notwithstanding which the latter shall have been entered into it will not be annulled. See *Walter*, § 313-326.

⁷ Partly by Constantine, partly by Theodosius II.: Const. 2. C. Th. 3. 7; Const. 6. C. 1. 9. For religious reasons Justinian forbade marriage between the sponsor and the baptized: Const. 26. C. 5. 4. See § 140, note 3.

⁸ fr. 26. D. 23. 2; fr. 13. D. 34. 9; Novel 134. c. 12. By the modern canon law marriage is forbidden between the adulterer and adulteress only in two cases, viz., when the adulterer plots the husband's death or in the event of his death promises to marry the accomplice: cap. 1. 3. 6. X. 4. 7; cap. 6. X. 4. 17.

⁹ Since Constantine: Const. un. C. 9. 13; Novels 143. 150. By the canon law it is also annulled when the seduced, independent of the seducer's power, voluntarily assents to marriage: cap. 6. 7. X. 5. 17; Conc. Trid. sess. 24. de reformat. matr. c. 6.

3. Because of guardianship, between the guardian or his son, or him who is under the guardian's power or with whom he stands under the same power (grandson), or who has inherited from the guardian, and the pupil, so long as the guardian's account has not been rendered after the attainment of the majority by the pupil and the time for the restoration to her former condition (*integrum restitutio*) has matured.¹

4. For political reasons the marriage was forbidden between the *præses provincie* or other provincial officers and a female living in the province.²

5. Because of degency, between a freeborn and a public woman or *famosæ mulieres*.³

6. Because of inequality of position,⁴ between senators and their descendants through males to the third degree and emancipated persons, as also with actors and their children.⁵ However, in the cases under divisions 5 and 6, by the *lex Julia et Papia Poppæa*, the marriage was not null, but only was not protected against the punishment of celibacy;⁶ but subsequently in some of these cases it was declared null;⁷ but under the Christian emperors, and particularly⁸ by ordinances of Justin⁹ and Justinian,¹⁰ these marriage impediments ceased.

C. EFFECT OF MARRIAGE IMPEDIMENTS.

Putative Marriage.

§ 556. If a marriage shall have been entered into notwithstanding one of the marriage impediments mentioned in § 553–555, then it is null according to Justinian's express prescript, and neither in regard to the parties thereto nor of the children has it the effect of a legal marriage.¹¹ If, by the entry therein, one party, or if both parties, acted in good faith, *i. e.*, if the one or the

¹ By a *senatusconsultum* under Marcus and Commodus: fr. 59. fr. 62. § 2. fr. 66. D. 23. 2; Cod. 5. 6; *Vredenburg*, Diss. de prohibitis nuptiis inter tutorem et pupilum, Leyden, 1805.

² First by imperial mandate: fr. 57. pr. fr. 63. D. 23. 2; Cod. Th. 3. 11; Cod. Just. 5. tit. 2. 7.

³ Ulpian, XVI. § 2. See Ulpian, XIII.

⁴ Since when *connubium* exists between patricians and plebeians. See § 26, *supra*. In ancient times an emancipated person was not generally allowed the right to marry one of a higher grade (*gentis enuptio*): Livy, XXXIX. 19.

⁵ Ulpian, tit. 13. tit. 16. § 2; fr. 43. § 7–13; fr. 44. D. 23. 2; *Heineccius*, ad Leg. Jul. et Pap. Popp. lib. 2, c. 1, 2.

⁶ *Savigny*, System, Vol. 2, p. 516, *seq.*

⁷ fr. 16. pr. D. 23. 2; fr. 16. D. 23. 1. See fr. 3. § 1. D. 24. 1; fr. 27. 34. § 3. fr. 42. § 1. D. 23. 2; Const. 1. C. 5. 27; Const. 7. C. 5. 5.

⁸ See also Cod. Theod. 8. 16. and Cod. Just. 8. 58.

⁹ Const. 23. C. 5. 4. This constitution is generally attributed to Justinian; but its inscription is false, as has been shown by *Heineccius*, ad Leg. Jul. et Pap. Popp. lib. 2, c. 2, § 4.

¹⁰ Const. 24. 29. C. 5. 4; Novel 78. c. 3; Novel 117. c. 6.

¹¹ § 12. I. 1. 10; Cod. 5. 8. On the canon law see § 555, note 6.

other, or both parties, did not know that their marriage was forbidden by an impediment, then this marriage is termed a putative marriage. The rules that when in such case the party who acted in good faith has all the rights of a truly married person, and that the children, in relation to both husband and wife, are to be deemed as legitimate,¹ have not yet been adopted by the Roman law,² notwithstanding that this is generally believed.³

IV. MODE OF ENTRY INTO MARRIAGE.

§ 557. To enter into a valid marriage,⁴ the Roman law requires only⁵ the

¹ *Hertius*, Diss. de matrimonio putativo, in opusc. Vol. 1, T. 1, p. 245.

² But the canon law has: cap. 2. 11. 14. X. 4. 17.

³ Because of fr. 57. § 1. D. 23. 2. and Const. 4. C. 5. 5. But these passages do not show it, *Buchholtz*, Jur. Abh. No. 13, even if Const. 3. C. 5. 18. does not directly contradict them.

⁴ The marriage referred to is what still appears in Justinian without *manus*. The former *manus mariti* (note 6, p. 410, *supra*) could arise in three modes: *usu*, *farreo s. confarreatio* and *coemptio*: Gaius, I. § 110. *Usu* originated when a woman who was not in tutelage lived with a man one year continuously, i. e., without being absent three nights (*trinoctium*) from his house: Gaius, I. § 111; Serv. ad Georg. I. 31; Cicero pro Flacco, c. 34; Gellius, III. 2; Macrob. Saturn. I. 3. *Farreo* originated from the celebration of the sacrifice of white bread (*farreum s. panis farreus*), wherein certain priests and ten witnesses were present and in which formal words were spoken and acts were done: Gaius, I. § 112; Ulpian, IX.; Serv. l. c. Id. ad Æn. IV. 103. 374. The *coemptio* finally was a fictitious purchase entered into by the husband by weight and scales with the wife under the authority of her tutor, or if she were *filiafamilias*, entered into with her parent: Gaius, I. §§ 113. 195; Cicero pro Murena, c. 12. de orat. I. 56; pro Flacco, c. 34; pro Cluentio, c. 5; Serv. ad Georg. I. 31; ad Æn. IV. 103. 214; Bæth. ad Top. c. 3; Collat. IV. 2. 7; *Keller*, Grundriss, § 208. The *confarreatio* appears to have been introduced only for patricians; both the other modes of origin, at least since the time of the twelve tables, appear to have been introduced without reference to station. The *coemptio matrimonii causa* was in imitation of the *coemptio fiduciæ causa*, to which we will return below: Gaius, I. §§ 114. 115. 115 a. 118. 118 a. 136. 195. The modes of origin of the *manus mariti* gradually ceased, and with them even the *manus mariti* itself. The origin through *usus* had ceased already at the time of Gaius, partly by law and partly by desuetude: Gaius, I. § 111. The *confarreatio* appeared as long as heathenism reigned, because certain priests descended from a marriage by *confarreatio* and had to live in such one: Tacitus, Ann. IV. 16; Serv. ad Æn. IV. 103. 374; Gaius, I. § 112. See also Serv. ad Georg. I. 31; Tacitus, Hist. IV. 53; Festus v. Flaminius; but by a *senatusconsultum* under Tiberius the *manus* with its civil law effects was no longer founded on these ceremonies: Tacitus, Ann. IV. 16; Gaius, I. § 136. Hence the *coemptio* was already at the time of Gaius the only mode of origin of the *manus*, and it is mentioned neither in the Corpus Juris nor in the Code Theodosian, and we do not know when or how it ceased to exist.

⁵ By the canon and present law several formalities are to be observed on the entering into marriage, which differ with the various religious sects and with the modern laws, and whose interpretation must be left to the church laws: *Waller*, § 307-309; *Hartitzsch*, Eherecht, § 155-175.

simple consent of both parties,¹ and of those persons in whose power they are.² But they who bear high honors in the empire and *personæ illustres* must, by Justinian's prescript, enter into marriage by a written marriage contract (*dotalia instrumenta*).³ The consent to marriage must be faultless; hence if either party be afflicted with idiocy, madness, lunacy, or their essential characteristics, the marriage is invalid.⁴

CHAPTER II.

OF THE EFFECTS OF MARRIAGE.

I. IN RELATION TO THE PARTIES TO THE MARRIAGE.

A. RIGHTS IN COMMON.

§ 558. The personal relations of husband and wife to each other are determined by the idea and characteristics of marriage (§ 548, *supra*). It is a community for the whole life and for all of the vicissitudes of the husband and of the wife, from which results the right and duty of the one party towards the other;⁵ but there are no legal compulsory rights, but only duties,⁶ excepting so far as this has been changed by positive law. As respects the common rights and duties of husband and wife, the Roman law prescribes,⁷

¹ fr. 2. D. 23. 2; fr. 15. D. 35. 1; fr. 30. D. 50. 17; *Ortolan*, in the *Thémis*, X. p. 496.

² fr. 2. 19. D. 23. 2. and pr. I. 1. 10; *Ulpian*, V. 2; *Paul*, II. 19. § 2. The emancipated son, therefore, did not require the consent of his father: fr. 25. D. 23. 2; but yet it could not be refused to the child in paternal power without sufficient cause, otherwise the government had the right to compel the father to consent: fr. 19. D. 23. 2.

³ Novel 117. c. 4. 6. Previously, in Novel 74, he had prescribed this for all persons of a senatorial or higher station, and even for all persons of a less station, only the latter might prefer a record of it made in the church.

⁴ fr. 16. § 2. D. 23. 2; *Paul*, II. 19. § 7; *Const.* 14. C. 5. 4. See cap. 6. 14. 15. 24. 28. X. 4. 1; cap. 2. X. 4. 7.

⁵ But formerly, when the wife was in the *manus* of the husband, there was in addition the following, but which, when she was *uxor tantum* (had not all the rights of a wife), ceased by the Justinian law: the wife was to the husband as a quasi daughter (*filia loco*), and to his father, in whose power he was, a quasi granddaughter (*neptis loco*): *Gaius*, I. §§ 111. 114. 115. b. 136; II. §§ 139. 159; III. § 3; *Ulpian*, XXII. § 14. She therefore ceased to be *sui juris* if she were so previously, and emerged from the *patria potestas* if she were previously therein; at the same time, like an adopted daughter, she entered into the agnatic union of her husband and became, especially with his agnatic children, in the relation of an agnatic sister: *Gaius*, III. §§ 14. 24; *Coll.* XVI. § 6. On the other hand, she emerged from her former agnatic union and therefore suffered a *minima capitis diminutio*: *Gaius*, I. § 162; IV. § 38; *Ulpian*, XI. § 13.

⁶ See *Walter*, § 327; *Harttzeck*, *Eherecht*, § 182-198.

⁷ Thus, *e. g.*, a compulsory right for the performance of the marital duty, *i. e.*, conjugal copulation (*jus in corpus*), is not to be thought of according to the Roman law. But see c. 3. C. 22. qu. 2; c. 12. 14. C. 32. qu. 4.

because of the honor and tender regard which husband and wife should pay each other, that no action for a penalty or infamy is permissible between them.¹ They have the benefit of competence (*beneficium competentiae*) against each other (§ 532, *supra*), and cannot be required to testify against each other.² The violation of conjugal fidelity is threatened with evil consequences, but, with rare exceptions, only when committed by the wife,³ who thereby perpetrates a heinous crime.

B. SPECIAL RIGHTS OF EACH PARTY.

§ 559. The rights which the Roman law expressly concedes to the husband⁴ are—

1. He has the designation of the common habitation, and the wife must follow him to it, unless he is banished for crime.⁵ Against third persons who detain the wife against her husband's will he has the same interdicts which the family father has,⁶ and in actions by the wife he can appear as her presumed counsel,⁷ and for wrongs committed against her he can institute an action in his own name.⁸ He can also require from her obedience and reverence.⁹ On the other hand,

2. The wife can require from the husband protection and defence.¹⁰ She acquires the name and station of her husband, and therewith also the same dignity in a court of justice.¹¹ The latter right she retains after his death so long as she does not enter into a second marriage.¹²

II. IN RELATION TO THE PROPERTY OF HUSBAND AND WIFE.

§ 560. Marriage *per se* has no influence on the property of husband and wife.¹³ The property of both parties remains in its former condition and separate. Each party continues owner of his or her property,¹⁴ and has the

¹ fr. 2. D. 25. 2; Const. 2. C. 5. 21; Const. ult. § 4. init. C. 6. 2. See § 480, *supra*.

² fr. 10. pr. D. 38. 10.

³ Respecting a case in which the husband is the violator, see Novel 117. c. 9. § 5.

⁴ fr. 5. D. 43. 2; fr. 65. D. 5. 1; Const. 9. C. 10. 39.

⁵ arg. Const. 22. C. 9. 47; Const. 24. C. 5. 16.

⁶ fr. 2. D. 43. 30; Const. 11. C. 5. 4.

⁷ Const. 21. C. 2. 13.

⁸ fr. 2. D. 47. 10.

⁹ fr. 14. § 1. in f. D. 24. 3; Const. 12. § 1. C. 8. 18.

¹⁰ fr. 2. D. 47. 10.

¹¹ Const. 9. C. 10. 39; Const. 13. C. 12. 1. See Novel 22. c. 36.

¹² fr. 22. § 1. D. 50. 1.

¹³ This is applicable to marriage without *manus*. The former wife *in manu mariti* was as unable to possess property in her own right as in the ancient time the family son (*filiusfamilias*) was. Everything that she had immediately before the entry in the *manus* of itself passed to the husband, and if he were still under power to his *parens*, that which was acquired through her during the continuance of the *manus* also belonged to the head of this family: Gaius, II. § 86, *seq.*; III. § 82, *seq.*; Ulpian, XIX. § 18.

¹⁴ However, when in doubt and till the contrary is shown, everything in the hands

free disposition of it. A change in this can be effected only by a special arrangement; but such arrangements are frequent, because of the rule of law that the husband alone must bear the expenses of the married life, or, as it is expressed, the burdens of marriage.¹ In connection with this property is particularly to be considered the *dos*, the gift because of marriage (*propter nuptias donatio*), the *parapherna* and the dotal pacts (*pacta dotalia*). There are also acts whose legal effect is less when the persons whom they affect are married to each other than if they were not (§ 480, p. 418, *supra*, note 1). This is especially applicable to gifts between husband and wife (*donatio inter virem et uxorem*), which will be treated on hereafter.

A. DOS.²

1. Notion.

§ 561. Marriage portion (*dos, res uxoria*)³ is all that property which on marriage is transferred by the wife herself or by another to the husband⁴ with the view of diminishing the marriage burden to him.⁵ The husband retains it for himself during the continuance of marriage, and must generally return it after it has ended, for which the action *dotis* may be instituted against him (§ 568, *infra*). Every *dos* presumes the existence of a true and valid marriage (*dos sine nuptiis esse non potest*).⁶

of the wife is considered as proceeding from the husband and a gift to the wife (*præsumtio Muciana*): fr. 51. D. 24. 1; Const. 6. C. 5. 16; Glück, Comm. Vol. 24, p. 390, *seq.*; Vol. 26, p. 217, *seq.*

¹ fr. 20. § 2. init. fr. 46. D. 10. 2; fr. 7. pr. fr. 56. § 2. D. 23. 3.

² Ulpian, VI.; Paul, II. 21. 22; Cod. Theod. III. 13; Dig. XXIII. 3-5; Cod. V. 11-15; Novel 91; Novel 97. c. 2-6; Novel 100; Novel 109; Fragm. Vaticana tit. de re uxoria ac dotibus, § 94, *seq.*; Donellus, Comm. jur. civ. Lib. 14, cap. 4-8; E. Schenk, Das Recht der dos vor Justinian, Landshut, 1812; Rambonnet, Spec. observ. quibus illustratur historia dotium, Utrecht, 1819; Glück, Comm. Vol. 24, § 1229, Vol. 25, § 1239-1252; Vol. 27, § 1273, *seq.*; Husse, Das Güterrecht der Ehegatten nach Rom. Recht, Vol. 1, § 58, *seq.*; Tigerström, Das Römische Dotalrecht, 2 vols., Berlin, 1831, 1832.

³ Whether in a marriage with *manus* there can be a true *dos* is disputed. See Cicero, Top. c. 4; pro Flacco, c. 34; Fragm. Vat. § 115; Husse, Güterrecht, Vol. 1, p. 220, *seq.*

⁴ But if he be still in the paternal power, then the *dos* will be assigned to the family father: fr. 57. fr. 59. pr. D. 23. 3.

⁵ On the notion of *dos* see, in addition to the writers cited in note 2, also Meyerfeld, Disp. de quibusdam quar de dote actione reddenda sunt, Marb. 1826. § 1. It frequently happens in Germany that the wife has an outfit (*apparatus s. instructus mulieris*), by which is understood those things which the wife brings with her for her own necessities and for the first furnishing of the household. These belong to the *dos* and have the same rights and privileges: Puffendorf, Obs. T. 1, nr. 206; Glück, Comm. Vol. 24, p. 534.

⁶ § 12. I. 1. 10; fr. 3. 21. 39. § 1. fr. 43. pr. fr. 76. in fin. D. 23. 3; fr. 4. § 2. D. 2. 14; Const. 20. C. 5. 3.

2. *Objects of Dos.*

§ 562. Everything may be the object of *dos* by which the property of the husband is increased.¹ Hence not only corporeal things of every kind, but also a *jus in re*,² the renunciation of such right *dotis causa*,³ a claim against a third person,⁴ the renunciation of a claim against the husband himself (*liberatio mariti dotis causa facta*),⁵ and the renunciation in favor of the husband of a deferred right *dotis causa*,⁶ may be the objects of *dos*. The wife can also give her entire estate to her husband *in dotem*. This, however, is always to be understood as the net property after deduction of debts. A universal succession is never created by it, hence the husband in such case is not personally bound for the wife's debts.⁷

3. *Kinds of Dos.*

§ 563. All persons having the free disposition of their estate may constitute *dos*.

1. In relation to the right to demand the return of the *dos*, after a divorce from marriage, there is a difference between *profectitia* and *adventitia dos*.⁸ *Profectitia dos* is termed that which is derived from the property of the wife's father or paternal grandfather; they may immediately constitute it themselves or authorize another to constitute it.⁹ In such cases, when the marriage has ceased, the constitutor of the *dos* may have the *dotis* action without special reservation.¹⁰ That *dos* is termed *adventitia* which is not *profectitia*, be it given by the wife from her own estate,¹¹ or by the wife's mother or a third person.¹² In this case the *dotis* action always belongs to the wife and her heirs, excepting when the constitutor expressly reserved to herself the right of reclamation, in which case it is termed *receptitia dos*.¹³

2. The constituting of *dos* generally depends on the free will of the constitutor. Yet exceptionally the wife's father and paternal grandfather are legally bound to dotate in proportion to their estate,¹⁴ when she has no

¹ Hasse, § 72; *Tigerström*, Vol. 1, §§ 16, 17.

² fr. 7. § 2. D. 23. 3.

³ fr. 57. D. 24. 3.

⁴ Const. 2. C. 4. 10.

⁵ fr. 12. § 2. fr. 41. § 2. fr. 43. pr. D. 23. 3.

⁶ fr. 14. § 3. D. 23. 5.

⁷ fr. 72. D. 23. 3; Const. 4. C. 5. 12; fr. 39. D. 50. 16. See end of § 465, *supra*.

⁸ Hasse, § 90-106; *Tigerström*, Vol. 1, § 4.

⁹ fr. 5. pr. § 1-8. D. 23. 3; Ulpian, VI. 3.

¹⁰ fr. 6. pr. D. 23. 3; Ulpian, VI. 4; Const. 4. C. 5. 18.

¹¹ *Contra*, *Tigerström*, Vol. 1, p. 45, who in this case terms it *dos* absolute, in contradistinction from *profectitia* and *adventitia dos*. But see fr. 5. § 11. in fin. D. 23. 3.

¹² fr. 5. §§ 9. 11. 14. D. 23. 3; Ulpian, VI. 3.

¹³ Ulpian, VI. §§ 5. 6; fr. 33. D. 23. 3; fr. 31. § 2. D. 39. 6; Const. un. § 13. C. 5. 13. See *infra*, § 567.

¹⁴ fr. 19. D. 23. 2; fr. 69. § 4. D. 23. 3; fr. 6. D. 37. 6; Const. 7. C. 5. 11. It does not depend on the paternal power, hence the emancipated daughter can claim *dos*

estate,¹ and subject to this condition the mother also is bound, but only for special reasons.² Some writers hold that the wife herself is legally bound to constitute *dos*, if she have an estate. That *dos* whose constitution rests on legal necessity is now termed necessary *dos*, in contradistinction from voluntary *dos*, which depends on the free will of the giver.

3. Each *dos* which does not consist of a sum of money may when it is constituted be appraised to the husband at a money value (*dos aestimata*). In this case the husband is generally considered as the purchaser of the dotal things and as the wife's debtor for the appraised value (*dos venditionis causa aestimata*). However, in a divorce he has the election whether he will restore the dotal things contributed or their appraised value.³ Yet by a special convention the object of the valuation of the dotal things may be determined in another way (*dos taxationis causa aestimata*).⁴

4. Of the Form of the Constitution of *Dos*.

§ 564. *Dos* may be constituted by a transaction between the living, and—

1. By the ancient law,⁵ either by *promissio dotis*, *i. e.*, the promise of *dos* by stipulation; or by *dictio dotis*,⁶ *i. e.*, the promise of *dos* on the part of the bride or wife, or her father, or her debtor, by formal words, without a preceding request and without an acceptance of the promise being required;⁷ or on *datio dotis*, *i. e.*, actual transfer of the object of the *dos* without a preceding *promissio* or *dictio*.⁸

from her father: arg. fr. 5. §§ 11. 12. D. 23. 3. and Const. 7. cit.; *Hasse*, p. 347. *Contra*, *Tigerström*, Vol. 1, p. 73. The adopted father is legally bound to dotate to the adopted daughter: fr. 5. § 13. D. 23. 3. The duty to dotate to the daughter does not descend to the father's heirs, excepting if he had promised the *dos* when living: fr. 44. pr. D. 23. 3; Const. 5. C. 5. 11. The Roman law is silent on the father's duty to dotate to the daughter twice for the same marriage, if the first *dos* were casually lost. But if the father retained the *dos* out of the daughter's first marriage, he must deliver it to her on the entering into a second marriage without deduction: Auth. *sed quamvis*, C. 5. 13; *Glück*, Comm. Vol. 25, p. 78, *seq.*

¹ arg. fr. 5. § 7. D. 23. 3. The daughter now has no right to claim *dos* if she marry against her parents' will or if she cause a right to disinherit her.

² Const. 14. C. 5. 12. See Const. 19. § 1. C. 1. 5.

³ fr. 10. pr. D. 23. 3; fr. 9. § 3. D. 20. 4; Const. 5. C. 5. 12; Const. un. §§ 9. 15. C. 5. 13. On the effect of such valuation of the *dos*, see §§ 565, 568, *infra*.

⁴ fr. 10. § 6. fr. 69. § 7. D. 23. 3; fr. 50. D. 24. 3; Const. 1. C. 5. 23; Const. 21. C. 5. 12. See, generally, *Tigerström*, §§ 17, 50.

⁵ Ulpian, VI. § 1; Gaius, Epit. II. 9. § 3; Const. 3. C. Th. 3. 13; *Heineccius*, Ant. Rom. Lib. 2, tit. 8, § 4 7; *Hasse*, § 73-87.

⁶ *Mejboom*, Die Diction die Rom. Brautgabe, Dorpat, 1850.

⁷ *Hugo*, R. G. p. 624. The majority of writers think that an acceptance was necessary: *Glück*, Comm. Vol. 20, p. 200; *Hasse*, § 82; *Tigerström*, § 13. Others think that neither a formal assent nor an acceptance of it was necessary, but only simple verbal assent: *Walter*, R. G. Vol. 2, § 499.

⁸ fr. 41. § 2. fr. 43. pr. fr. 48. § 1. D. 23. 3; *Tigerström*, § 10.

2. By the modern law¹ the promise of *dos* no longer depends on the ancient form, by *promissio* or *dictio*. Every properly-accepted promise of *dos*, or even the simple *pollicitatio dotis* (unaccepted promise of *dos*), though given by one who was not previously obligated by *dictio dotis*, is valid and actionable;² and by the modern law the promisee, for the security of the *dos* promised to him, has a legal lien on the entire property of the promisor (§ 344, *supra*).³ The *datio dotis* is, in the modern law, the same as in the ancient.

The appointment of a *dos* may also be founded on a direction by last will—

3. When something is bequeathed to the wife *dotis nomine*; in such case she has to appoint this as *dos* to the husband.

4. Or when something is immediately bequeathed to the husband as *dos*; in such case the appointment is made in the testament itself.⁴ The appointment of *dos* is never presumed, but they who assert the dotal character of a thing must prove it.⁵

5. *The Husband's Rights in the Dos.*

§ 565. If at the time of the transfer of the dotal things to the husband or afterwards (see note 8, p. 423) the conditions for the acquisition of property happen, then the husband and not the wife always becomes the owner thereof;⁶ but

¹ By an ordinance of Theodosius II. and Valentinian III. See § 470, *supra*.

² Const. 3. 4. C. Th. 3. 13; Const. 6. C. 5. 11; Const. 25. C. 4. 29.

³ Const. un. § 1. C. 5. 13. On the interest payable for delay of the *dos promissa*: Const. 31. § 2. C. 5. 12. On the *evictio dotis*: Const. 1. C. 5. 12; Glück, Comm. Vol. 20, p. 198; Vol. 25, p. 80.

⁴ fr. 48. § 1. D. 23. 3; fr. 77. § 9. D. 31; fr. 71. § 3. D. 35. 1; Hasse, §§ 88, 89.

⁵ Bauer, Diss. bona uxoris paraphernalia, Leipsic, 1762; Glück, Comm. Vol. 27, § 1278.

⁶ Gaius, II. §§ 62, 63; pr. I. 2. 8; fr. 7. § 3. fr. 75. D. 23. 3; fr. 21. § 4. D. 50. 1; fr. 3. § 5. D. 4. 4; Const. 23. 30. C. 5. 12. The greatly-contested question, What right has the husband to the *dos*? is divided into three principal heads:—

1. According to the ancient common view of the jurists, the husband becomes the true owner if the *dos* consist in fungible things or were appraised to him for the purpose of sale (*venditionis causa*), otherwise the actual ownership of it remains in the wife (*dominium naturale*); but it is suspended during marriage, and the use of it is in the husband by virtue of his own right or the *dominium civile*: Hellfeld, Jurispr. for. § 1234–1236; Hartitzsch, Ehe recht, § 255–257; Thibaut, Pand. §§ 447, 448.

2. According to a modern view, but which is already found in Cujas in observat. Lib. 10, c. 32, the husband always becomes wholly and solely owner of the *dos* and the wife has only a claim for the future restitution of it: Hasse, Von der ehel. Gütergemeinschaft, § 16, and Güterrecht der Ehegatten, § 69; Glück, Comm. Vol. 25, § 1234; Unterholzner, Schuldverh. Vol. 2, p. 414.

3. Against both views is Tigerström, Vol. 1, § 23–29, § 35–37, according to whom the wife remains owner of the *dos*, but the husband acquires only the usufruct combined with an independent administration agency of it. Donellus, in Comm. jur. civ. Lib. 14, c. 4, had already a similar view. The dogmatic history of this doctrine see in Tigerström, Vol. 1, § 41.

as the wife has the right to claim their return after divorce, it may be said that the *dos* belongs to the property of the wife. As owner of the *dos* the husband is authorized to administer the dotal property, to take all the products of it, and to use the property in every lawful way,¹ without being bound to give an account of his administration or to give security.² He also acquires the accessions of³ and substitutes for it,⁴ and all increase of the dotal property.⁵ He transmits the *dos* to his heirs.⁶ Further he may claim the dotal property from every possessor of it, even from his wife,⁷ and for its enforcement he may institute the *rei vindicatio* as well as the action *Publiciana in rem*.⁸ He may alienate the movable dotal property without the wife's consent,⁹ bequeath it to a third person,¹⁰ expend the dotal money or property valued in money, and enforce the payment of the dotal claims, without requiring a cession of them by the wife.¹¹ In regard to the immovable dotal property, the husband cannot, even with the wife's consent, voluntarily alienate or pledge it,¹² unless the land, at the time it was brought into the *dos*, was

¹ fr. 7. pr. fr. 10. § 3. D. 23. 3; Const. 20. C. 5. 12. He does not first acquire the products by perception, but as the owner of the principal thing he acquires them at their origin and as independent things by each severance (§ 273, *supra*): fr. 78. pr. D. 23. 3.

² Const. 1. 2. C. 5. 20.

³ fr. 4. D. 23. 3; i. e., they belong to him, like the *dos* itself, of which they form a part and with which he must always restore them: fr. 10. § 1-3. fr. 69. § 9. D. 23. 3; Const. 1. § 9. C. 5. 13. See *infra*, § 567.

⁴ Respecting the changing of the dotal property (*res dotalia pecunia comparatæ*), see fr. 26. 27. 32. 54. D. 23. 3; fr. 22. § 13. in fin. D. 24. 3; Const. 12. C. 5. 12; Const. 7. C. 7. 8. The very incorrect notions of the older jurists hereon are most fully seen in *Glück*, Comm. Vol. 8, p. 167, *seq.* *Tierström*, Vol. 1, pp. 257, 265, note 5, has the correct view.

⁵ fr. 10. § 1. fr. 65. D. 23. 3; fr. 58. D. 24. 3; fr. 3. pr. D. 23. 5.

⁶ fr. 1. § 1. D. 23. 5; fr. 62. D. 41. 1. It is self-evident that the action *dotis* for restitution of the *dos* also passes over against the husband's heirs (§ 568, *infra*). But if the *dos* were not appointed to the husband, but to his father or grandfather (§ 561, *supra*, note 4), then, after the latter's death, it does not descend against his heirs, but against the husband: fr. 56. §§ 1. 2. D. 23. 3; fr. 58. D. 35. 2; fr. 20. § 2. fr. 46. fr. 51. pr. D. 10. 3.

⁷ Const. 11. C. 5. 12; Const. 9. C. 3. 32; fr. 24. D. 25. 2. If it come into the hands of a third party and the husband do not claim it, then the prescription thereof commences only from the time when the wife herself could first assert her right: Const. 30. C. 5. 12. See § 571, *infra*.

⁸ fr. 3. § 1. D. 6. 2. If the property of another were given to him as *dos*, then he can usucapion it *pro dote*: *Gaius*, II. § 63; fr. 67. D. 23. 3; Dig. 41. 9; Cod. 7. 28; *Tierström*, § 31.

⁹ pr. I. 2. 8. fr. 42. D. 23. 3. Therefore he may manumit the dotal slaves: Const. 3. C. 5. 12; Const. 1. 7. C. 7. 8.

¹⁰ fr. 13. § 4. D. 23. 5; fr. 1. § 10. fr. 7. § 13. D. 33. 4; Const. 3. C. 5. 12.

¹¹ Const. 2. C. 4. 10.

¹² *Gaius*, II. § 63; pr. I. 2. 8. and *Theophilus ad h. l.*; Dig. 23. 5; Cod. 5. 23;

appraised to him as a sale,¹ then he may aliene it;² but if the husband aliene dotal land which he had no right to do, then the wife may contest such alienation from the time when she or her heirs may claim the return of the *dos* and redemand the aliened land.³ But neither the husband nor his heirs are authorized to aliene the land when they desire to do this only for their own interest, *i. e.*, if, after the ending of the marriage, they have disposed of the *dos*;⁴ but the husband may reclaim an invalid alienation otherwise made by him.⁵ But should the wife become the husband's heir, then she may only contest the illegal alienation to the extent that she will not be satisfied from her husband's inheritance on account of her *dos*.⁶

6. *The Husband's Duties in relation to the Dos.*

§ 566. The husband's duties in relation to the *dos* during the marriage are that the products of the *dos*, according to their object, shall be applied to the benefit of the marriage;⁷ and as he during marriage reaps all the advantages of the *dos*, so he must also bear all the burdens and expenses which are requisite to the acquisition of its products.⁸

7. *Restitution of the Dos.*

a. *Object of the Restitution.*

§ 567. In general, after the dissolution of the marriage, the *dos* must be

Const. un. § 15. C. 5. 13. The *lex Julia de fundo dotali*, a section of the *lex Julia de adulteriis*, forbade the alienation of it in a narrow sense only for the case when it occurred against the wife's will, and also forbade the pledging of it even with the wife's consent. By it she appears to take precedence of the quiritarian property of the husband. Subsequently it no longer depended on this requisite, but the jurists had not then yet agreed if the prohibition were to be applied to rural land, to which it did not originally relate, because it was impossible to have quiritarian private property therein: Gaius, l. c. Justinian decided this question affirmatively and at the same time rendered effectless the consent of the wife to alienate in its narrow sense. The prohibition does not apply to necessary alienations: Const. 2. C. 5. 23. See, generally, *Glück*, Comm. Vol. 25, §§ 1236, 1250, *seq.*; *Tigerström*, § 30.

¹ On an important exceptional case, see fr. 3. § 1. fr. 17. D. 23. 5.

² fr. 10. § 6. D. 23. 3; fr. 11. D. 23. 5; Const. un. § 15. C. 5. 13; excepting if at the valuation the choice were expressly reserved to the wife whether she, after the dissolution of the marriage, will demand the return of the land or its value: Const. 1. C. 5. 23.

³ Const. 30. in fin. C. 5. 12; fr. 13. § 3. D. 23. 5.

⁴ fr. 17. D. 23. 5; arg. fr. 17. D. 21. 2; fr. 3. D. 21. 3; Const. 11. C. 8. 45. See § 299, *supra*.

⁵ arg. Const. 16. C. 5. 71. and Const. 1. C. 6. 60; *Glück*, p. 403, *seq.*

⁶ fr. 13. § 4. D. 23. 5; fr. 77. § 5. D. 31.

⁷ In the case of maladministration measures for the wife's security may be taken: fr. 22. § 8. D. 24. 3.

⁸ fr. 3. § 1. fr. 13. fr. 16. D. 25. 1. On the wrong of the husband in relation to the restitution of the *dos*, see § 567, *infra*, note 6, p. 425.

restored.¹ What must be restored as *dos* depends chiefly on what was conceded or given as *dos*.²

A. If money, property valued in money or other things in quantity be given to the husband as *dos*, then during the marriage they are wholly at his risk, and at the dissolution of the marriage he must restore an equal sum or quantity of like quality as that he received.³

B. If other movable or immovable property be given him as *dos*, then it again depends on—

1. If the same were appraised to him at the time of delivery, if naught else had been agreed on, and when doubtful, it is considered that it was sold to the husband (§ 563, *supra*), who must therefore bear its risk during the marriage, and at its dissolution he must return its appraised value in money.⁴ However, if it be determined that either the dotal property *in specie* or its appraised value in money shall be returned, in such case the rules respecting alternative obligations apply, by which, when in doubt, the debtor has the election, hence the husband, what he will do.⁵

2. If the dotal property be conceded to him without appraisement of its value, or be appraised to him without the purpose of sale, then he must restore it *in specie*, and he is bound for *dolus* and *culpa*, and must give the same care to it as he does to his own (*diligentia quam in suis rebus*), but he is not bound for casual damages.⁶ Should it, however, be alienated by him, then he must reimburse its value.⁷ With the principal property he must restore all accessions to it during the marriage.⁸ But respecting the products it is a universal rule that the husband has a right to them during marriage. If, therefore, the marriage existed throughout several entire fruit periods, then the products realized during those periods belong solely to the husband and he need not restore them. If, on the contrary, the marriage began or ceased during such a fruit period, then the husband can only claim a part of the products in proportion to the continuance of the marriage during that period; the other part belongs to the wife or her heirs, irrespective whether the husband or the wife undertook their perception.⁹ On the other hand, the hus-

¹ Ulpian, VI. § 4. *seq.*; Dig. 24. 3; Cod. 5. 13. and 18; Glück, Comm. Vol. 27, § 1273; Tigerström, Vol. 2, § 42-49.

² Meyerfeld, Disp. de quibusdam quæ de dote actione, Marb. 1826; Tigerström, Vol. 2, § 50-52.

³ fr. 41. § 4. fr. 42. D. 23. 3.

⁴ fr. 19. pr. D. 23. 3; fr. 9. § 3. D. 20. 4; Const. 5. C. 5. 12; Const. un. §§ 9. 15. C. 5. 13.

⁵ fr. 10. § 6. fr. 11. D. 23. 3.

⁶ fr. 17. pr. D. 23. 3; fr. 18. § 1. fr. 24. § 5. fr. 25. § 1. fr. 66. pr. D. 24. 3; Hase, Von der Culpa, 2d ed. p. 420; Meyerfeld, *supra*.

⁷ arg. fr. 54. D. 23. 3; Const. 12. C. 5. 12.

⁸ fr. 10. § 1-3. D. 23. 3; Const. 1. § 9. C. 5. 13.

⁹ fr. 7. § 1. D. 23. 3; fr. 5. fr. 6. fr. 7. pr. §§ 1. 2. 3. 6. 7. 8. *seq.* fr. 25. § 4. fr. 31. § 1. D. 24. 3; Const. un. § 9. C. 5. 13. On the computation of the husband's part

band is entitled to reimbursement for the expenses incurred by him during the marriage on the dotal property to be restored,¹ and for the necessary expenses he has a right of retention and compensation; but after its delivery he has the *condictio indebiti* or *sine causa*. For the meritorious expenses he has only the *contraria mandati* or *negotiorum gestorum* action, and for the luxurious expenses only a right to bar the wife's action (*jus tollendi*).²

C. When a right in another's property is assigned to the husband as *dos*, then, after the dissolution of the marriage, it must be transferred to the person who can claim the return of the *dos*, if no cause exist by which it *ipso jure* ceases, as, *e. g.*, the usufruct on the husband's death.³

D. If a claim be given as *dos* and it still exist on the dissolution of the marriage, then it must be returned; otherwise the value of it must be reimbursed.⁴

E. If the husband be released from a debt as *dos*, then, upon the dissolution of the marriage, the debt is revived.⁵

F. If a right be renounced for the husband's benefit as *dos*, then this right or the object thereof must, after the dissolution of the marriage, be restored to the wife.⁶

b. Action for the Return of the Dos.

§ 568. The action for the return of the *dos*—

1. Previous to Justinian depended on whether the return was especially stipulated for or not. If the former, then the action *ex stipulatu de dote reddenda* (on the stipulation for the return of the *dos*) might be instituted, and if the agreement were not a stipulation, but only a simple innominate contract (§ 443, *supra*), the *præscriptio verbis actio* (action on the words of the contract) might be instituted, neither of which was subject to special restrictions. In the second case, when the *dos* could be redemanded without stipulation, the *rei uxoris s. dotis s. de dote* action could be instituted, a *bonæ fidei* action, which was subject to many limitations.⁷ These limitations partly affected the person of the plaintiff (§ 569, *infra*) and the time of the return (§ 570, *infra*), so that for several causes deductions (*retentiones*)

according to fr. 7. § 1. D. 24. 3. see *Cujas*, ad Pauli sent. rec. Lib. 2. tit. 22. § 1; ad Papiniani question. Lib. II. Observat. Lib. 14. c. 22; *Donellus*, Comm. jur. civ. Lib. 14, c. 7; *Schrader*, De divisione fructum dotis, Helmstedt, 1805; *Glück*, Comm. Vol. 27, § 1276. d-k.

¹ Ulpian, VI. § 14-17; Dig. 25. 1; *Biener*, De impensarum in res dotales, Leipsic, 1824.

² § 37. I. 4. 6; fr. 56. § 3. D. 23. 3; fr. 5. pr. §§ 1. 2. fr. 7. § 1. fr. 8-11. pr. D. 25. 1; fr. 7. § 16. D. 24. 3; Const. un. § 5. C. 5. 13; *Glück*, Comm. Vol. 27, § 1280; *Tigeström*, Vol. 2, p. 59; *Dernburg*, Compensat. p. 109, *seq.*

³ On the restitution of a usufruct constituted as *dos*, see fr. 57. D. 24. 3; fr. 66. fr. 78. § 2. D. 23. 3; *Meyerfeld*, *supra*, c. 22-24.

⁴ *Meyerfeld*, *supra*, § 2-21.

⁵ fr. 12. § 2. fr. 43. pr. § 1. D. 23. 3.

⁶ fr. 14. § 3. D. 23. 5.

⁷ Const. un. C. 5. 13.

could be made;¹ and, finally,² the husband,³ as defendant, had the benefit of paying what he was able (*beneficium competentiæ*).

2. Justinian further extended the right for reclaiming a *dos* whose return was not agreed on. He prescribed that a stipulation (§ 569, *infra*) should be presumed, on which an action on the stipulation could be instituted, which, in the whole, was of the nature of a contract action, and in which the special limitations of the former *rei uxoriæ* action cease,⁴ so far as the contrary was not specially prescribed. However, this new action on the stipulation belongs to the *bonæ fidei* actions, and the husband shall only be condemned to the extent of his ability to pay,⁵ as in the old action *rei uxoriæ*, and the return shall not always be immediately required after the dissolution of marriage (§ 570, *infra*). The same action with its characteristics must be instituted, if one, who without an express convention therefor, can institute it, specially stipulated for the return of the *dos*. If another person constitute the *dos*, and on the constitution stipulate for the return of it, then for such person and heirs there is the ordinary old action on the stipulation; and if the convention be not clad in the form of a stipulation, then such person has the action on the words of the contract (*præscriptio verbis*).⁶

c. *Persons who may Claim the Return of the Dos.*⁷

§ 569. 1. When the wife is living at the dissolution of the marriage, then—

a. According to the ancient law, if she be *sui juris* she has the *rei uxoriæ* action, and if she be *filiafamilias*, then he who has the paternal power has the action, but may sue only with her consent.⁸ Herein there is no distinction between *dos* derived *ex parte paterna* and that derived otherwise (*profectitia* and *adventitia dos*). The wife's right of action, if she have not already commenced suit or at least placed the debtor in default, does not pass to her heirs,⁹ but the father's passes to the wife, whether he die before or after the institution of suit.¹⁰

b. By the Justinian law neither the wife nor her *patrens* can reclaim the

¹ Especially on account of expenses, donations and abstractions, and in the case of the dissolution of the marriage (formerly, before the guilty wife lost the whole *dos*), on account of children and immorality: Ulpian, VI. § 9, *seq.*

² The edict *de alteruto* also applies to this. See Const. un. § 3. C. 5. 13.

³ Also his father and his children out of the same marriage, but not his other heirs: fr. 15. § 2. fr. 16. 18. D. 24. 3; fr. 12. 13. 21. D. 42. 1.

⁴ Especially the deductions, Const. un. § 5. C. 5. 13, and the edict *de alteruto*, Const. un. § 3. C. 5. 13.

⁵ Const. un. § 7. C. 5. 13; § 37. I. 4. 6; *Stemann*, Diss. de veterum dotis actionum, Kiel, 1826. *Tigercron*, Vol. 2, § 54-56, § 63-65.

⁶ Const. un. § 13. C. 5. 13.

⁷ See § 567, *supra*, note 1, p. 425. See *Vangerow*, § 220, Rem. 1.

⁸ Ulpian, VI. § 6; fr. 2. §§ 1. 2. fr. 3. fr. 22. §§ 4. 6. 9. 10. fr. 34. D. 24. 3; Const. 2. 7. C. 5. 13.

⁹ Ulpian, VI. § 7; *Fragm. Vat.* § 59.

¹⁰ Const. un. § 14. C. 5. 13.

dos if the marriage be divorced and the wife be the guilty party (§ 579, *infra*). Otherwise a stipulation for the return of the *dos* for the wife's benefit will be generally presumed, and only then may the father or grandfather in the old way institute a suit in his own name in the new action on the stipulation if it concern a *dos ex parte paterna* and the wife be still in the donor's power.¹ Every other *dos*, if the wife be still *filiafamilias*, falls into the property derived otherwise than from the father or grandfather (*peculium adventitium*).² If the wife die, then the action always passes to the heirs;³ if the father or grandfather die, then his action passes to the wife or her heirs.⁴

2. If the marriage be dissolved by the wife's death—

a. Then, by the ancient law, the *profectitia dos* may be reclaimed in the *rei uxoris* action by the donor if he still live and a pact *de lucranda dote* were not made, whether the wife had been under his power or not.⁵ If there be children existing out of the marriage in question, then the husband retains because of each child a fifth part;⁶ so that if there be five or more children there is naught to be paid. If the donor of the *profectitia dos* be dead or if the *dos* be *adventitia*, then the husband generally receives it, and only in one exceptional case have the wife's heirs the *rei uxoris* action, i. e., when the husband caused her death.⁷

b. By Justinian's ordinance the stipulation presumed for the wife's benefit, as also for her heirs, is effectual if a pact *de lucranda dote* be not made.⁸ The donor of the *profectitia dos* still living has only in the single case the preference over the heirs when the wife as his *filiafamilias* is dead, so that he would have had the action on the stipulation even if the marriage had been dissolved without her death.⁹ In this case it matters not whether children of the marriage in question exist or not.¹⁰ If the husband become poor or bankrupt he is obliged to return the *dos* even during marriage.¹¹ In several other cases he is permitted to restore the same during marriage.¹²

¹ Const. un. pr. §§ 11. 13. 14. C. 5. 13. On the last case, see also Const. 2. C. 6. 60. and Novel 97. c. 5.

² Const. 2. C. 5. 18.

³ Const. un. § 4. C. 5. 13.

⁴ Const. un. § 14. C. 5. 13.

⁵ Ulpian, VI. § 4; fr. 6. D. 23. 3; fr. 71. D. 21. 2; fr. 5. D. 24. 2; fr. 10. pr. fr. 59. D. 24. 3.

⁶ Ulpian, l. c.

⁷ Ulpian, VI. §§ 4. 5.

⁸ Const. un. § 6. C. 5. 13.

⁹ Const. un. § 13. C. 5. 13.

¹⁰ But this was a contested matter between the glossators Bulgarus and Martinus: Savigny, *Gesch. des R. R. im Mittelalter*, Vol. 4, p. 83. On the later views, see Glück, Vol. 27, p. 205, *seq.*

¹¹ fr. 24. pr. D. 24. 3; Const. 29. C. 5. 12; Const. 1. C. 5. 17; Novel 97. c. 6. But in this case the income must be applied to the marriage burdens, and the husband's creditors have no claim thereon.

¹² fr. 20. D. 24. 3; fr. 73. § 1. D. 23. 3. In general the husband cannot return the *dos* during the marriage: Const. un. C. 5. 19; Const. 20. C. 5. 12; Novel 22. c. 39.

d. *Time for the Return of the Dos.*

§ 570. 1. By the ancient law the return of the *dos* after the dissolution of marriage depended on whether the *dos* could be reclaimed in the action *ex stipulatu*, or on the words of the contract (*præscriptio verbis*), or only in the action *rei uxoriæ*. In the first case the whole *dos* could be reclaimed immediately on the dissolution of marriage. In the second case the husband was only liable to return the quantities received in three annual periods (*annua bima, trima die*), but he had to restore all other things immediately on the dissolution of marriage.¹ By Justinian's more modern ordinance the dotal land must be returned immediately after the dissolution of marriage, unless there be a convention to the contrary. For movable things, which also include things in quantities, it depends on (when the new action *ex stipulatu* may be instituted) whether a certain revenue be paid by a third party or if the husband used them in his household or business. In the first case the husband must divide the produce of the year in which the marriage was dissolved with the wife or her heirs in proportion to the time. In the second case he need not return them till the end of the year. If the husband or his heirs delay the return beyond this time they must pay four per centum interest for the delay.²

e. *The Wife's Security for the Dos.*

§ 571. In the ancient law there was but little security for the *dos* excepting the prohibition to alienate the dotal land (§ 565, *supra*). If the husband gave no hypotheca for her security for the restitution of the *dos*, then in the event of the marshalling of his assets she had only a highly personal preference over his chirographic creditors.³ Justinian gradually gave her several securities.

1. In the year 528 he prescribed⁴ that if the wife, because of the impoverishment of the husband, be in the position to reclaim the *dos* during the marriage (end of § 569, *supra*), and hence to hold the husband's property conventionally hypothecated to her as security, she shall not only be protected by a defence against the subsequent lien creditors if she be in possession of this property, but shall also be authorized to institute an hypothecary action against the possessor of the property hypothecated to her if the latter have not an older and better right to the same, and the defence of the subsisting marriage shall not be set up against her.

And even in the exceptional cases a promise to return it is not binding: fr. 28. D. 23. 4; Glück, Comm. Vol. 27, § 1276, a. b.

¹ On this ancient law, Ulpian, VI. § 8; Fragm. Vatic. § 94-122.

² Const. un. § 7. C. 5. 13; Glück, Comm. Vol. 27, § 1276, c.; Tigerström, Vol. 2, § 66.

³ fr. 17. § 1. D. 42. 5; fr. 74. D. 23. 3; Const. un. C. 7. 74; Dabelow, Vom Concurse, pp. 214, 256; Tigerström, Vol. 2, §§ 67, 68.

⁴ Const. 29. C. 5. 12. See fr. 24. pr. D. 24. 3; Const. 30. in fin. C. 5. 12; Novel 97. c. 8.

2. Justinian, by a constitution in the year 529,¹ prescribed the following:

a. The wife shall have the right on the dissolution of the marriage to claim all the still existing dotal property in an action *in rem*, be it movable or immovable, appraised or unappraised, as if it were her own property (*res quasi proprias*), and no creditor of the husband shall in pursuance of an hypotheca thereon have a better right to it.

b. The wife shall also have a legal hypotheca on the dotal property, and she shall have the choice either to claim the property in an action *in rem* or claim it in the action hypothecary. In the latter action she shall have preference over all the hypothecary creditors of the husband.

c. Respecting both of these actions the prescription shall only run against her from the time she might have instituted them.

3. In the year 530 Justinian gave for the security of the wife, her heirs and to her father if he had the right to reclaim (but not to a third party constitutor of the *dos*), a general legal hypotheca on the entire property of the husband. In this, however, they stood back of his older and better pawn and hypothecary creditors.²

4. Finally Justinian prescribed, in the year 531, that the wife and her children (but only these) should also have a preference over all in this hypotheca.³

B. GIFT BECAUSE OF MARRIAGE⁴ (*propter nuptias donatio*).

§ 572. The Christian emperors before Justinian instituted several rules respecting the bridegroom's gift to the bride in anticipation of marriage (*ante nuptias* or *antenuptialis donatio*) not applicable to other gifts, whereby this gift obtained a certain resemblance to *dos*.⁵ This gave rise to the ordinance

¹ Const. 30. C. 5. 12. However, this constitution is construed in various ways. See, on the one side, especially Glück, Comm. Vol. 25, p. 142; Tigerström, Dotalrecht, Vol. 2, § 69. Buchholtz, Jur. Abh. No. 11, leaves to the wife the choice between the action *in rem* and the action *hypothecaria*. Jungensfeldt, Über das Pfandrecht an eigener sache (Gieszen, 1827), p. 44, only allows the wife the action *hypothecaria* for the dotal things.

² Const. un. §§ 1. 3. 4. 11. 13. C. 5. 13.

³ Const. 12. C. 8. 18. See Novel 97. c. 2. 3; Novel 109. c. 1. and §§ 350, 352, *supra*, as also the writings therein cited, and also Tigerström, Vol. 2, p. 378, § 76.

⁴ § 3. I. 2. 7. and Theophilus ad h. l. Cod. 5. 3. and the Constitutions and Novels cited in the following notes. On the idea, object and the entire juridical relations of *donatio propter nuptias* the jurists still entertain very conflicting views. See Schorch, Diss. de donatione propter nuptias, Erford. 1787; Koch, Diss. de donatione propter nuptias, Leipsic, 1818; Glück, Comm. Vol. 25, § 1242. In Germany the Roman *propter nuptias donatio* is not recognized.

⁵ Included in which is especially—

1. That they generally become retrogressive if the marriage do not occur: Const. 15. 16. C. 5. 3. (see Const. 10–12. C. 5. 3); § 3. I. 2. 7.

2. That on the dissolution of the marriage it regularly passes to the husband like the *dos* to the wife, Const. 18. C. 5. 3, but on a divorce the guilty husband

of Justin¹ which permitted this gift to be increased during marriage, and of Justinian's ordinance² that a gift having the characteristics of the former *ante nuptias donatio* may be made after as well as before marriage, wherefore it is no longer termed *ante* but *propter nuptias donatio*. At a later period Justinian prescribed further rules respecting the *propter nuptias donatio*, and by the most modern Justinian law those in force are chiefly the following:

1. The husband's father is as much bound to contribute a gift because of marriage as the wife's father to contribute a *dos*.³

2. The gift because of marriage and the *dos* must be equal. The excess of one over the other is invalid.⁴

3. The gift because of marriage is not usually delivered to the wife, but the husband retains it or receives it primarily to manage and to apply the receipts, like those of the *dos*, to the bearing of the marriage burdens; but he cannot alienate or pledge the immovables belonging to it, even with the wife's consent, unless she repeat her consent after the lapse of two years.⁵ The wife has also for the security of her claim on the gift because of marriage a legal but unprivileged hypotheca on the husband's property.

4. In the event of the husband's impoverishment the wife may claim the marriage gift like the *dos*, even during marriage; but she cannot alienate it, but must apply the revenue for the benefit of the marriage.⁶

5. After the dissolution of marriage a distinction is to be observed—

a. If the marriage be dissolved by the wife's death or by divorce, then the husband retains the gift because of marriage for himself, unless a third party contributed it and reserved to himself its reclamation,⁷ or if the husband were the guilty party in a divorce, in which case he loses it as a penalty and it passes to the wife.⁸

b. If the marriage be dissolved by the husband's death, then, generally, the gift because of marriage passes to his heirs. For this case a pact *de lucranda propter nuptias donatione* for the wife's benefit is just as permissible as a pact *de lucranda dote* is for the husband's benefit when the marriage is dissolved by the wife's death.

loses it to the wife, like the guilty wife loses the *dos* to the husband (§ 579, *infra*); and if the marriage be dissolved by the husband's death, a pact respecting the gift because of marriage is allowed, as when dissolved by the wife's death a pact respecting the *dos* is allowed. See *infra*, note 1, p. 432.

¹ Const. 19. C. 5. 3.

² Const. 20. C. 5. 3.

³ Const. 7. C. 5. 11.

⁴ Novel 22. c. 20; Novel 97. c. 1. 2; Novel 98. c. 2.

⁵ Const. 29. C. 5. 12; Novel 61. c. 1; Novel 97. c. 6. The wife in certain cases may contest it.

⁶ Novel 61. c. 1; Novel 109. c. 1.

⁷ Const. 18. C. 5. 3; Const. 31. § 1. C. 5. 12; Novel 22. c. 20. § 1.

⁸ Const. 8. §§ 4. 5. 7; Const. 11. C. 5. 17; Novel 22. c. 8. 9. 18; Novel 53. c. 6; Novel 117. c. 9. §§ 4. 5. c. 13. (See *infra*, § 579.)

Neither of these conventions can be concluded without the other. If one of them do not relate to the whole, and at the same time to less than the other, then the greater is invalid to the extent that it exceeds the lesser.¹

C. PARAPHERNA.

§ 573. All the wife's property other than the *dos* and the gift because of marriage is termed *parapherna*.² Of this she is and continues to be the absolute owner. She may alienate the property appertaining to it, whether it be movable or immovable, and the husband has no right to it other than that which the wife allows him.³ The wife may allow him property therein⁴ or transfer to him only the administration of it (*res in parapherna datæ*). In the former he has all the rights of owner; in the latter he is bound to account for his administration⁵ and to pay damages caused purposely or by his neglect. In this respect he must exercise the same care which he exercises in his own affairs,⁶ and the wife's security for her parapherna, as far as it consists in claims, is a legal but unprivileged hypotheca on the husband's property (§ 344, *supra*).⁷

D. MARRIAGE PACTS⁸ (*pacta dotalia*).

§ 574. The rights of property of husband and wife are frequently more closely defined by marriage conventions, marriage pacts, marriage articles (*pacta dotalia s. nuptialia*),⁹ which may be entered into before or after the marriage.¹⁰ In the former, the condition that the marriage follows is of course understood.¹¹ They are usually in writing (*instrumenta dotalia*), and serve as proof of all conventions which have been made in regard to the *dos* or generally of the pactor's property relating to the marriage. But it is not necessary that they be reduced to writing,¹² nor is a judicial record thereof required,

¹ Const. 20. pr. C. 5. 3; Const. 9. 10. C. 5. 14; Novel 22. c. 20; Novel 97. c. 1. On the children's right to this marriage profit (*lucrum nuptiale*), see *infra*, § 580.

² *Hulder. ab Eyben*, De jure paraphernorum, in his works edited by *Hert*, Strasburg, 1708, p. 307; *Glück*, Comm. Vol. 25, § 1240; *Hasse*, § 120-130.

³ Const. 8. 11. C. 5. 14.

⁴ fr. 9. §§ 2. 3. D. 23. 3. But the *parapherna* is not thereby changed to a *dos*, because the intention so to constitute it is wanting: *Hasse*, p. 430.

⁵ fr. 95. pr. D. 35. 2.

⁶ Const. 11. C. 5. 14; Const. 21. C. 2. 13.

⁷ Const. 12. C. 5. 14.

⁸ Dig. 23. 4; Cod. 5. 14; *Glück*, Comm. Vol. 25, § 1244; *Tigerström*, Im Röm. Dotalrecht, Vol. 1, § 15, Vol. 2, § 77-80.

⁹ But a distinction is also made between nuptial pacts, which relate to the personal relations between parents and children, and dotal pacts, which relate to their property.

¹⁰ fr. 1. pr. fr. 12. § 1. fr. 20. pr. D. 23. 4.

¹¹ fr. 4. § 2. D. 2. 14; fr. 21. 68. D. 23. 3.

¹² Const. un. pr. C. 5. 13; Const. 15. C. 5. 12. By Justinian's prescript only persons bearing high honors and *personæ illustres* need a marriage agreement in writing: Novel 117. c. 4. 6. By the Roman law the legitimation of the illegitimate

if a gift contained in the writing does not require it.¹ In regard to their purpose, naught can be agreed on which is contrary to the object of the marriage² or to the respect of the husband and the esteem of the wife, or which opposes the constitution of the *dos*, and whereby the rights of either husband or wife in relation to the *dos* or the marriage gift are diminished or imperilled.³ Yet a convention that the husband on the wife's death shall be permitted to retain the *dos*,⁴ and the wife on the husband's death the gift because of marriage,⁵ is valid.

E. GIFTS BETWEEN HUSBAND AND WIFE⁶ (*donatio inter virum et uxorem*).

§ 575. Gifts made by husband and wife to each other during marriage are invalid *per se*, but become valid⁷ if the donor die during marriage without revoking them.⁸ The donor, but not the donor's heirs, may revoke the gift at any time, and may not only refuse the performance of his or her promise, but may also redemand the thing given, if it still exist, in specie, by the action *rei vindicatio*; but if it do not, by the *condictio sine causa*, but only to the extent that the donee at the time of the *litis contestatio* has been enriched by it.⁹ If the donor die before the donee, without revocation, then the gift becomes valid; if, on the contrary, the donee die before the donor, then the gift is and remains invalid, even without revocation. If both parties die at the same time, then the mutual gifts become valid.¹⁰

But all this applies only—

children by the subsequent marriage of their parents requires that they enter into a written marriage agreement: § 13. I. 1. 10; Const. 6. 7. 10. 11. Cod. 5. 27; Novel 89. c. 8.

¹ Const. 25. C. 5. 16; Novel 127. c. 2. See *supra*, § 467, div. 3.

² cap. 24. X. 2. 24.

³ Consult. vet. Icti, § 4, and Paul, Sent rec. I. 1. 6. E. g., fr. 27. § 2. D. 2. 14; fr. 2. fr. 4. pr. fr. 12. § 1. fr. 5. §§ 1. 2. fr. 6. fr. 14–17. D. 23. 4; fr. 14. § 1. D. 24. 3; Const. 3. 6. 9. 10. C. 5. 14; Novel 97. cap. 1; *Tigerström*, Vol. 2, § 81.

⁴ fr. 12. pr. fr. 26. § 2. D. 23. 4; Const. 6. C. 5. 14; Const. un. § 6. C. 5. 13.

⁵ See § 572, note 1, p. 432, *supra*.

⁶ Dig. 24. 1; Cod. 5. 16 (Tit. X. 4. 20); *Gentilis*, De donationibus inter virum et uxorem, Frankfurt, 1606; *Glück*, Comm. Vol. 25, § 1253, Vol. 26, to § 1258; *Harttisch*, Eherecht, § 205–222; *Savigny*, System, Vol. 4, p. 165, *seq.*

⁷ This validation rests on a *senatusconsultum* under the government of Septimius Severus and Antoninus Caracalla proposed by the latter in the year 208 of the present era. See fr. 23. 32. pr. § 1. D. 24. 1; Const. 3. C. 5. 16; *Savigny*, p. 180. Whether gifts by which only some things are promised are in this manner validated is much contested.

⁸ fr. 3. § 10. fr. 32. fr. 33. § 2. D. 24. 1; Const. 10. C. 5. 16. For the reason of the prohibition of the donation, see *Kammerer*, Obs. jur. civ., Rostock, 1828.

⁹ fr. 5. § 18. fr. 6. fr. 7. pr. fr. 31. § 2. fr. 55. D. 24. 1; *Dabelow*, Vom Concurse, p. 361, *seq.*

¹⁰ Const. 6. Const. 25. C. 5. 16; fr. 1. § ult. D. 41. 6; fr. 32. § 14. D. 24. 1; fr. 26. D. 39. 6; fr. 5. D. 34. 5.

1. To gifts between husband and wife, but not to other conventions, in which a gift is in whole or in part disguised,¹ and

2. To gifts between husband and wife, and not to gifts between betrothed, or to concubines, or to such gifts as are made after the dissolution of the marriage;² but otherwise it is immaterial whether the husband or wife gave immediately one to the other, or if the donor be connected only through the *patria potestas* with the husband or wife of the donee, or if the donee be connected in this manner with the husband or wife of the donor, or if some one who is thus connected with one of the married parties give to some person who is similarly connected with the other married party.³ There are, however, gifts between husband and wife which, from their incipience, are valid and irrevocable, in which are included, viz.: if the donee be not enriched or the donor not impoverished thereby;⁴ if the gift be for the benefit of the household or the acquisition of an honor;⁵ if the gift consist in trifles;⁶ if the gift be for the restoration of a building;⁷ if the other party made a gift which for some cause cannot be revoked;⁸ if it were made with the view to a divorce;⁹ and if the regent and regentess give to each other.¹⁰

CHAPTER III.

DISSOLUTION OF MARRIAGE.

I. IN GENERAL.

§ 576. Marriage is dissolved by—

1. Death and the *maxima capitis deminutio* (loss of status) of either the husband or the wife.¹¹

¹ fr. 5. §§ 5. 6. 7. fr. 7. § 5. fr. 52. D. 24. 1.

² fr. 5. pr. fr. 27. 64. 65. D. 24. 1; fr. 31. D. 39. 5. On the case if the gift be made in an invalid marriage, see fr. 3. § 1. fr. 32. §§ 27. 28. fr. 65. D. 24. 1; fr. 128. D. 30; Const. 7. C. 5. 16; *Savigny*, p. 167, *seq.*

³ fr. 3. § 2-8. fr. 32. § 16. D. 24. 1; *Fragm. Vat.* § 269; *Savigny*, pp. 171, 172, particularly note o. By whose death in such cases the gift is validated, see fr. 32. §§ 16. 20. D. 24. 1.

⁴ fr. 5. §§ 8-12. 16. fr. 8. 9. pr. fr. 5. fr. 32. § 14. D. 24. 1. In which is included if a husband or wife renounce an advantage for the benefit of the other: fr. 5. § 13-15. fr. 31. § 7. D. 24. 1.

⁵ fr. 31. § 10. fr. 40-42. D. 24. 1; *Ulpian*, VII. § 1.

⁶ fr. 7. § 1. fr. 31. §§ 8. 9. D. 24. 1.

⁷ fr. 14. D. 24. 1. But not if something be given for the building of a new house: fr. 13. § 2. D. 24. 1.

⁸ In such case there is a peculiar compensation: fr. 7. § 2. D. 24. 1. That all remuneratory gifts should be exceptions to the rule is of opinion: *Glück*, Vol. 26, pp. 194, 199.

⁹ fr. 11. § 11. fr. 12. fr. 60. § 1. fr. 62. D. 24. 1.

¹⁰ Const. 26. C. 5. 16.

¹¹ fr. 1. D. 24. 2. However, see *Novel* 22. c. 7. 8; *Hasse*, *Güterrecht*, §§ 55, 56.

2. By a marriage impediment arising during marriage, and which, by the ancient Roman law, was especially the case when an inequality of station arose,¹ and, by the modern law, when near relationship occurred.²

3. By divorce, which will be particularly treated of hereafter.

II. BY DIVORCE.³

§ 577. By divorce (*divortium*, *repudium*) is understood the dissolution of a valid marriage⁴ in the lifetime of both husband and wife agreeably to the will of one or both of them. The Romans proceeded on the principle that marriage, according to its moral nature, is a community for life founded on the free union of husband and wife, and is dissolvable at the will of husband and wife when either both of the parties or only one of them no longer feels disposed to such a community.⁵ Thus, with the Romans, divorce was a voluntary, private act,⁶ whose validity did not depend on a cause for it. However, since the time of the *lex Julia de adulteriis*, a form was prescribed for it.⁷ At an early period, on the reclaiming of the *dos*, regard was had if one party, and which, were guilty.⁸ The Christian emperors were the first to prescribe, by

¹ See, however, fr. 44. § 6. D. 23. 2; Const. 4. C. 5. 62; Const. 18. C. 5. 4.

² *E. g.*, when the father-in-law adopts his son-in-law without previously emancipating his daughter: § 2. I. 1. 10; fr. 67. § 3. D. 23. 2; *Hasse*, § 57. On two cases in which the canon law permits the marriage to cease for similar causes, see c. 27. 28. C. 27. qu. 2; c. 2. 7. 14. X. 3. 32; *Walter*, *Kirchenr.* § 320–329. See c. 6. 7. 8. X. 4. 19.

³ Dig. 24. 2; Cod. Theod. 3. 16; Cod. Just. 5. 17; Novel 22. c. 4–19; Novel 117. c. 8–14; Novel 123. c. 40; Novel 127. c. 4; Novel 134. c. 11; Novel (non-gloss.) 140; *Wannaar*, *Diss. de divortiiis et repudiis*, Ghent, 1820; *Wächter*, *Über Ehescheidungen bei den Römern*, Stuttgart, 1822; *Hasse*, *supra*, § 40–54; *Glück*, *Comm. Vol.* 26. § 1259, *seq.*; *Sarigny*, *Verm. Schriften*, Vol. 1, No. 4.

⁴ Also at present. The judicial annulling declaration, which at present is also allowed by the Catholic church law in an invalid marriage, is somewhat different: *Walter*, § 316; *Hartitzsch*, *Eherecht*, § 301.

⁵ fr. 19. 134. in f. D. 45. 1; Const. 2. C. 8. 39.

⁶ This was also generally in the former marriage with *manus*. However, after the marriage was renounced, the *manus* had also to be specially dissolved by *emancipatio*, and the wife might demand this from the husband: *Gaius*, I. § 137. In the olden time only the confarreated marriage appears to have been indissoluble, and that of the *Flamen Dialis* continued till the time of Domitian indissoluble, while other confarreated marriages, with the co-operation of the pontifices, might be dissolved by *diffareatio*: *Dionysius*, II. 25; *Gellius*, X. 15; *Festus*, *Diffareatio v. Flameo*; *Plutarch*, *Quæst. Rom.* 50.

⁷ It consisted in a renunciation by an emancipated person before seven full-aged Roman citizens as witnesses: fr. 9. D. 24. 2. Diocletian prescribed the transmission of a letter of divorce: Const. 8. 8. pr. C. 5. 17.

⁸ If the wife were the guilty party, deductions could be made sometimes because of children and other times because of immorality. If the husband were the guilty one, then he must restore the fungible property sooner than otherwise, and with the remainder he had to restore a proportional quantity of the income: *Ulpian*, VI.

specific ordinances, in which cases divorce is justifiable and in which cases not, affixing penalties for an unjustifiable divorce, and at the same time increasing the penalties of those who for their wrongful acts were justly repudiated (*justum repudium*). The several rules thereon were frequently changed.¹ By an ordinance of Anastasius² there should be included in the cases in which both parties in divorce were not punishable (*divortium bona gratia*) also the case when both parties have agreed to a dissolution of the marriage. But Justinian altered this,³ and threatened both parties with severe punishment if there were not sufficient cause.⁴ At present totally different rules prevail.⁵

III. EFFECTS OF THE DISSOLUTION OF MARRIAGE.

A. WITH RESPECT TO THE HUSBAND AND WIFE.

§ 578. In relation to the husband and wife, the consequences of a dissolution of marriage which arises from the death of one of the parties or by divorce are that all their personal relations to each other founded on the marriage cease (§§ 558, 559, *supra*). Either of them may enter into another marriage, excepting that the widow and the divorced wife must wait at least a year (§ 552, *supra*, 579, 582, *infra*); but so long as they do not marry again they retain their husband's name, degree and rank.⁶

B. IN REGARD TO THE ESTATE OF THE HUSBAND AND WIFE GENERALLY.⁷

§ 579. In regard to the estate of the husband and wife the dissolution of marriage has generally the effect—

§ 8-13. The retention because of children appears to have occurred when the wife or her father dissolved the marriage without sufficient cause. If the husband did this, then the *nota Censoria* affected him: Gellius, X. 23.

¹ See Const. 1. C. Th. 6. 13. of Constantine; Const. 2. C. Th. 3. 13. of Julian; Const. 2. C. Th. 3. 16. of Honorius; Novel Theod. 18. of Theodosian II.; Const. 8. C. 5. 17. of the same; Const. 9. Ibid. of Anastasius; Const. 10-12. Ibid., and Justinian's Novels cited in note 3, p. 435. The latest rules respecting when the husband and when the wife can pronounce a *justum repudium*, so that not the repudiated but the repudiating party is punished, are contained in Novel 117. c. 8. 9, and the latest rules respecting when a *divortium bona gratia* is allowed, i. e., a divorce by which neither husband nor wife suffers punishment, are contained in Novel 117. c. 10. 12.

² Const. 9. cit.

³ But first in Novel 117. c. 10.

⁴ Novel 117. c. 10; Novel 134. c. 11.

⁵ By the Catholic church law no divorce is permitted because of the sacramental characteristics of marriage. By the church law it is allowed to Protestants, who do not recognize such sacramental characteristics, always, however, only for a just cause and by a judicial decree of divorce: Tit. X. 4. 19; Walter, § 329-332; Hartitzsch, Eherecht, § 306-320.

⁶ fr. 22. § 1. D. 50. 1; Novel 22. c. 36.

⁷ On this matter see, especially, Wächter, Über Ehescheidungen bei den Römern, p. 113, *seq.*, p. 162, *seq.*, p. 236, *seq.*

A. That the husband must return only the *dos* (§ 572, *seq.*, *supra*) when he is not to acquire it at the wife's death (§§ 569, 574, *supra*), and his right to the wife's paraphernalia ceases.

B. But if the marriage cease by divorce, then, by the modern law,¹ there are the following special consequences in relation to the estate of the husband and wife:

1. Regardless of the fault of the one or the other party, it extinguishes every disposition by last will made during marriage by the one for the benefit of the other, as well as the intestate inheritance of the husband and wife;² and the marriage conventions between them also become invalid,³ excepting so far as they specially relate to the case of divorce, wherein they retain their validity.⁴

2. If, on the contrary, the divorce were caused by the fault of one of the parties—

a. Then the guilty wife, as a penalty, always forfeits her *dos* to the husband and the guilty husband his *propter nuptias donatio* to the wife;⁵ and in addition thereto the guilty wife cannot enter into a valid marriage for five years. If no *dos* and *propter nuptias donatio* were contributed, then, by earlier ordinances, the innocent party shall receive the fourth part of the estate of the guilty one; but not more than one hundred pounds gold.⁶ But, by Justinian's most recent ordinance, if no *dos* be contributed, the husband shall, in case of divorce because of the wife's fault, have no further claim for such fourth part, and the wife, in case of a divorce because of the husband's guilt, if more than three of his children exist from a former or the present marriage, shall have only a man's portion, but in addition thereto the usual fourth part of his estate.⁷

b. In several cases there are other pecuniary penalties for the same, viz.: If the marriage be justly dissolved because of the husband's relations with another woman, or because he falsely accused the wife of a violation of marriage, then he further loses for the wife's benefit one-third of the value in money of the *propter nuptias donatio*.⁸ If the marriage be dissolved because of a violation of it by the wife, then she is placed in a convent, and not only

¹ On the ancient law, see *supra*, § 577, note 8.

² fr. 49. § 6. D. 32; fr. un. D. 38. 11; Novel 117. c. 5.

³ arg. fr. 21. 68. D. 23. 3. and the authorities cited in note 2.

⁴ Novel 134. c. 10. in fin.

⁵ The violation of the marriage by the husband, in the sense of the Roman law, i. e., the committing of adultery with another's wife, by that law is not sufficient cause for the wife for divorce; but if he were beheaded for that offence, then the wife has the same claim on the *propter nuptias donatio* as in case of a just dissolution: Novel 134. c. 19.

⁶ Const. 8. §§ 4. 5. 7; Const. 11. § 1. C. 5. 17; Novel 22. c. 18; Novel 53. c. 6; Novel 74. c. 5. See cap. 4. X. 4. 29.

⁷ Novel 117. c. 5. in fin.

⁸ Novel 117. c. 9. §§ 4. 5.

loses her *dos* for the husband's benefit, but must give him in addition one-third of the value thereof from her own estate; her remaining property shall go partly to her descendants or ascendants and partly to the convent, and the latter shall have the whole of it if she have neither ascendants nor descendants.¹ All the penalties for divorce here named are imposed only when it is caused by the fault of one party, and they cease when both parties are in fault.²

3. If one of the parties be repudiated by the other party without sufficient cause,³ then the latter is not only punished with the loss of the *dos* or the *propter nuptias donatio*, or a substitute for the latter, but is also punished the same as if he or she had caused the divorce by his or her fault (see No. 2, *supra*). But, by the most modern law, the party offending is placed in a convent, be it the wife⁴ or the husband,⁵ and the party's remaining estate, as in the case of the repudiated wife because of the violation of marriage, vests partly in the convent and partly in the descendants or ascendants, if such exist; if not, then the whole vests in the convent. If the husband and wife divorce without sufficient cause by common consent, then both of them will be placed in a convent, and the entire estate of both vests in the convent and the descendants or ascendants.⁶

C. IN RELATION TO THE LUCRA NUPTIALIA IN PARTICULAR.⁷

§ 580. By *lucra nuptialia* is generally understood everything which a husband or wife in respect to the marriage acquires from the estate of the other, before marriage, or on agreeing to it, or during its continuance, or on its dissolution, without distinction whether it be owing to the generosity of the husband or wife, or in pursuance of the marriage contract, or against the will of the other party by virtue of a legal ordinance; hence it includes the *dos* which vests in the surviving husband and the *propter nuptias donatio* which vests in the surviving wife (§ 574, *supra*), and all gains arising from divorce (*lucra ex divortio*) (§ 579, *supra*), but not the *dos* which vests in the wife or the *propter nuptias donatio* which vests in the husband after the marriage is dissolved.⁸ The rights of husband or wife in relation to the *lucris nuptialibus* after the dissolution of marriage depend on whether children of the marriage exist or not. If there be no children, the party's right is unlimited, and he or she always retains the entire dominion in all *lucris nup-*

¹ The descendants receive two-thirds; and if no descendants exist, then the ascendants one-third; Novel 117. c. 8. § 2. c. 9. § 5. c. 13; Novel 134. c. 10. On the whole doctrine of the penalties for violation of marriage, see *Glück*, Comm. Vol. 27, p. 9-93.

² fr. 39. 47. D. 24. 3; *Glück*, *supra*, pp. 57, 58.

³ This cannot occur at this day: § 577, *supra*, note 5, p. 436.

⁴ Novel 117. c. 13.

⁵ Novel 127. c. 4. See Novel 117. c. 13.

⁶ Novel 134. c. 11.

⁷ *Wächter*, *supra*, p. 246, *seq.*

⁸ Const. 3. pr. C. 5. 9; Const. 11. § 1. C. 5. 17; Novel 22. c. 30; Novel 98. c. 2.

tialibus, with full power of disposition.¹ If there be children, this is also the rule, to which there is an exception when the acquiring party enters into a second marriage (§ 581, *infra*); and in some *lucra nuptialia* the property vests in the children of the marriage in question immediately, regardless whether the acquiring party enter into another marriage or not, and such party then only acquires the usufruct thereof for life. Novel 98. prescribes a similar rule respecting the *dos* and the *propter nuptias donatio* which the survivor acquires by the death of the other,² and also of all that by a divorce the innocent party acquires of the guilty one's estate as a penalty;³ and Novel 117. c. 5. makes a similar rule respecting the poor widow's portion which she is authorized to claim out of her deceased husband's estate (§ 679, *infra*), but Novel 127. c. 3. allows the survivor who has acquired the *dos* or the *propter nuptias donatio* by the death of the other party the full ownership of a male portion so long as he or she does not enter into another marriage. Those *lucra nuptialia* which do not vest in the children of the marriage in which they were acquired, in the life of the husband or wife acquiring them, because he or she did not enter into another marriage, may after death, if not consumed or aliened, be claimed by such children, even if they were not the heirs of the decedent.⁴

IV. PENALTIES OF THE SECOND MARRIAGE.⁵

§ 581. The husband or wife who enters into a second marriage suffers certain penalties, especially in relation to their estate;⁶ several of them occur of right, and are usually termed *pænæ secundarum nuptiarum*. They are not properly penalties, but are mostly only legal restraints on property whose sole object is the advantage of the children of the first marriage, who are too often postponed in such circumstances; hence these restraints cease of themselves if there be no children of the first marriage.⁷ There are, however, the following distinctions:

¹ Const. 3. § 1. in fin. C. 5. 9; Const. 11. § 1. C. 5. 17; Novel 22. c. 22. pr. c. 23. pr.; Novel 98. c. 2; Novel 117. c. 13.

² Formerly this was the rule only of the *propter nuptias donatio* and *dos* in the second marriage: Const. 4. C. 5. 9; Novel 22. c. 29.

³ Novel 98. c. 2. Theodosius and Valentinian had already allowed to the children the same rights to this *lucra* which they had to other *lucra* only after the entry into a new marriage: Const. 8. § 7. C. 5. 17. But see Justinian's Const. 9. § 1. C. 5. 9. and Const. 11. § 1. C. 5. 17. See Novel 117. c. 8. pr. c. 9. pr. c. 10.

⁴ Const. 5. § 2. Const. 6. § 3. Const. 8. § 1. C. 5. 9.

⁵ Cod. Theod. III. 8. 9; Novel Theod. 5. 7; Cod. Just. V. 9. 10; Novel 22. c. 22-48; *Jewell*, Diss. de pœnis secundarum nuptiarum, Utrecht, 1801; *Glück*, Comm. Vol. 24. § 1217, p. 112, *seq.*; *Zimmern*, Rechtsg. Vol. 1, § 177.

⁶ They nearly all rest on the ordinances of Christian emperors (see note 3, p. 441). By the *lex Julia et Papia Poppæa* the widower and widow who did not enter into a second marriage were even visited with the penalties inflicted for celibacy.

⁷ Const. 3. § 1. in fin. C. 5. 9; Novel 22. c. 22. pr. c. 23. pr.; Novel 98. c. 2; Novel 117. c. 13.

A. Several of these legal penalties affect the father as well as the mother if they enter into a new marriage.

1. The husband or wife entering into a second marriage loses for the benefit of the children of the first marriage the property in such *lucris nuptialibus*, besides what vested previously on the dissolution of the former marriage in the children thereof (§ 580, *supra*); however, he or she retains for life the usufruct in it,¹ and the children of the first marriage have for the security of their claim on the property a legal hypotheca on his or her entire estate.²

2. The husband or wife entering into a second marriage cannot give more to his or her second wife or husband, during life or in the event of death, than he or she leaves after death to the child of the first marriage who, being unjustly disinherited, receives the least. Should he or she violate this ordinance, then the excess of that left after death is held as being undisposed (*pro non scripto*), and is divided among the children of the first marriage in equal parts.³

3. The parent marrying again, if he or she have children of the former marriage, may increase but not diminish during marriage the *dos* contributed or the *propter nuptias donatio* for the second marriage, so that the effect of the ordinance mentioned above in No. 2 shall not be frustrated.⁴

4. The husband or wife who is bound to give his or her children a legacy or fidei-commis, subject to a condition or after the lapse of a certain time, must, if he or she enter into a second marriage, give security for it, which otherwise he or she is not obliged to do.⁵

B. Other legal penalties only affect the mother,⁶ which include—

1. When a mother has entered into a second marriage, or enters into it

¹ Gratian, Valentinian and Theodosius, who issued the first ordinances of this kind in relation to the wife, and Theodosius II. and Valentinian III., who extended them to the husband, allow them only a limited property, to wit, the designation of which of the children of the marriage in question shall receive the *lucra*: Const. 3. 5. C. 5. 9. But Justinian withdrew this right of designation, and in Novel 22. c. 22, *seq.*, prescribed that at the moment of entering into a second marriage the property shall vest in the children: Const. 3. pr. Const. 5. C. 5. 9; Novel 22. c. 23–26.

² Leo applies this to the wife's property and Justinian to the husband's: Const. 6. § 2. Const. 8. §§ 4. 5. C. 5. 9; Const. 6. § 4. C. 6. 61; Novel 22. c. 24.

³ Leo first prescribes this: Const. 6. pr. Const. 9. C. 5. 9; Novel 2. c. 4; Novel 22. c. 27. 28. 48.

⁴ Const. 19. C. 5. 3; Novel 22. c. 31. comp. with c. 28.

⁵ According to ordinances of Zeno and Justinian: Const. 6. pr. § 1. C. 6. 49; Novel 22. c. 41. *Glück, supra*, p. 185, restricts the whole prescript to the father.

⁶ Constantine's ordinance, by which the father on entering into a second marriage lost his rights arising from the paternal power, to the *bona materna* of the children of the first marriage, Const. 3. C. Th. 8. 18, was abrogated by Leo: Const. 4. C. 6. 60. See also Justinian's Const. ult. C. 6. 59; Const. 13. C. 6. 58; Novel 22. c. 34. Novel 6. c. 7, which relates to the husband alone, belongs to the church law.

after inheriting *ab intestato* to a child of the first marriage, together with its brothers and sisters, then she retains the usufruct of her inheritance portion of so much of the inherited estate as came from her father, while the property descends to the co-inheriting children.¹

2. If the mother gave something to a child of the first marriage she cannot, if she enter into a second marriage, revoke the gift if it otherwise were valid, but she can revoke it only when the child attempted her life, or violently injured her, or undertook something against her whereby she might have lost her entire estate.²

3. The mother, by the second marriage, loses the right to claim that the rearing of the children of the first marriage shall paramountly and absolutely be entrusted to her.³

4. The woman who hitherto as the mother or grandmother was the tutor of her children or grandchildren loses the right of guardianship when she enters into a second marriage.⁴

Other property penalties may occur from a particular disposition by husband or wife or a third person, by which the entry into another marriage causes the forfeiture of all that the deceased husband or wife or a third party left to the survivor on condition not to marry again.⁵ In such case it does not depend on the existence of children of the first marriage. Such survivor may, after the expiration of a year, demand the devise or bequest

¹ Novel 22. c. 46. 47. Gratian, Valentinian and Theodosius first prescribed that this acquisition should be treated as a *lucrum nuptiale*: Const. 10. C. Th. 8. 18. Theodosius II. and Valentinian III. extended it to the father who entered into a second marriage: Const. 8. C. Th. 5. 1. From the time of the compilation of the Cod. Just. to the time of Novel 118, by the then existing law of inheritance, such case could not occur with the father; hence the second ordinance was not incorporated in the Code. To the first ordinance was added that it should apply when the mother inherited *ex testamento*: Const. 3. § 1. C. 5. 9; Const. 5. C. 6. 56. The inequality between mother and father introduced thereby caused Justinian to repeal the entire prescript by Novel 2. c. 3; but in Novel 22. he re-enacted it for that part which the mother inherited *ab intestato*.

² Constantine's sons forbade every revocation for these causes: Const. 1-4. C. Th. 8. 13. Justinian incorporated this ordinance in the Code: Const. 7. C. 8. 56. But at a later period he restricted it to the mode mentioned in Novel 23. c. 35.

³ Const. 1. C. 5. 49. of Severus Alexander; Novel 22. c. 38.

⁴ Novel 22. c. 40; Novel 94. c. 2.

⁵ Cod. 6. 40; Novel 22. c. 43. 44. The rule that the annexed *conditio ridicuitatis* in a disposition by last will shall be observed, and what was devised or bequeathed could only be claimed against the *cautio Muciana*, suffered an exception by the *lex Julia Mucella*, at least in the case of a widow to whom property was left by her deceased husband if she promised in the first year by oath *liberorum querendorum causa* to marry again. Justinian found that this oath was offensive, and hence, by two ordinances of the Code, omitted the condition first to the widow and subsequently to the widower. But in Novel 22. he reinstated the law previous to the *lex Julia*, however, with many new particulars.

provisionally if he or she give security that in the event of marrying again he or she will return what was received.¹

V. PENALTIES FOR VIOLATING THE YEAR OF MOURNING.

§ 582. If the marriage be dissolved by the husband's death,² then the wife must wait at least one year³ before she may marry again.⁴ If she marry again during the mourning year, then she suffers, in addition to the usual penalties from a second marriage (§ 581, *supra*), the following⁵ special penalties:⁶

1. She becomes infamous.
2. She loses all the *lucra nuptialia* of the former marriage, and these vest in the descendants, ascendants and brothers and sisters of her former husband, and, on their failure, to the *fiscus*.
3. She cannot contribute more than the third part of her estate as *dos* to her second husband, or apply it in any other way in his favor during life or in the event of death.
4. She cannot acquire anything by last will, and all inheritances and legacies left to her are invalid, and vest for the benefit of the other testamentary or intestate heirs of the estate leaver.
5. She can inherit only *ab intestato* from kin to the third degree. Though all these penalties may be remitted by a rescript of the regent; but to obtain such pardoning rescript she must immediately renounce to the children of the first marriage the half of her estate, without retaining the usufruct of it and without being able to claim any of it again, if one of these children die intestate, so long as other children of the first marriage or their descendants exist. The renounced estate returns to her only on the total failure of these.⁷

¹ Novel 22. c. 44.

² If it be dissolved by divorce, then the wife, if she do not enter into a convent and thereby become forever incapable from entering into marriage, when the guilty party must wait five years, and in any event one year, till she may marry again (§ 579, *supra*). A marriage in violation of this prohibition is, by the Roman law, nugatory. On the other hand, the penalties fixed for violating the mourning year have not been extended to this case.

³ Before Gratian, Valentinian and Theodosius it was only ten months: Const. 2. C. 5. 9.

⁴ Const. 8. § 4. in fin. Const. 9. C. 5. 17; Novel 22. c. 16. pr. See *supra*, § 553, note 6.

⁵ The penalty of infamy is found already in the prætorian edict; on the other hand, the penalties in division 2-5 in the text were first introduced by Gratian and his co-regents.

⁶ fr. 1. D. 3. 2; Const. 1. 2. C. 5. 9; Const. 4. C. 6. 56. Especially Novel 22. c. 22; Glück, Comm. Vol. 24, § 1217, p. 189.

⁷ All these penalties, by Novel 39. c. 1, affect the wife if she violate the mourning year, not by marrying again, but by incontinence; and also, by Novel 22. c. 40, these penalties shall be inflicted when a mother who has undertaken the tutorship of her legitimate and illegitimate children marries again before she has

VI. SEPARATION FROM BED AND BOARD (*separatio quoad thorum et mensam*).

§ 583. Distinguished from the proper divorce of marriage is the simple personal separation of husband and wife from bed and board (*separatio conjugum quoad thorum et mensam*). By the former the bond of marriage itself is dissolved, so that it has ceased to exist; by the separation from bed and board only the duty of husband and wife to live together is annulled, while the marriage itself between them continues. Such separation is unknown to the Roman law. It was first introduced by the canon law.¹

SECTION SECOND.

OF THE PATERNAL POWER.

CHAPTER I.

OF THE RELATIONS BETWEEN PARENTS AND CHILDREN GENERALLY.

I. OF LEGITIMATE PATERNITY AND FILIATION.

§ 584. A legitimate child is one who was begotten by a husband with his wife in lawful marriage. This is presumed—

1. If it were not born before the 182d day after marriage² and

2. Not later than the tenth month after its dissolution.³ In this case, according to the rule *pater est, quem nuptiæ demonstrant* (he is the father whom the marriage indicates),⁴ the husband is deemed to be the father of

effected the appointment of another tutor, accounted for and transferred the property: *Schweppe*, Pand. § 722. The canon law repealed the penalty of infamy for premature marriage: cap. 4. 5. X. 4. 21. But from this it does not necessarily follow that at present the other penalties have ceased.

¹ Tit. X. 4. 19; cap. 12. X. 2. 23; cap. 6. X. 5. 16; cap. 8. 13. X. 2. 13; Conc. Trid. Sess. 24. de reformat. matrim. c. 6-8. It is sometimes decreed for life (perpetual separation) and sometimes only for a period (temporary separation). The perpetual separation, with the Catholics, takes the place of divorce from marriage, and is decreed by them for causes for which Protestants divorce from marriage: c. 23. C. 32. qu. 5; c. 4. 5. C. 32. qu. 6; cap. 6. X. 4. 19; c. 21. X. 3. 32. It has, respecting property, all the consequences of divorce from marriage. The *dos* must be returned if the wife have not forfeited it: c. 1. 4. X. 4. 20. It does not exist among Protestants. The temporary separation is recognized by Protestants as well as Catholics when dissatisfaction rules between husband and wife. It is viewed as an attempt at reconciliation between husband and wife, and may, according to circumstances, be extended. It has no influence on the estate. See *Walter*, Kirchenrecht, § 330; *Glück*, Comm. Vol. 26, § 1269; *Harttisch*, Eherecht, § 321-324. § 387-389.

² fr. 3. § 12. D. 38. 16; fr. 12. D. 1. 5; fr. 6. D. 1. 6.

³ fr. 3. § 11. D. 38. 16. See fr. 29. pr. D. 28. 2; Const. 4. C. 6. 29; *Glück*, Comm. Vol. 28, § 1287, e.

⁴ fr. 5. D. 2. 4; *Huse*, Guterrecht der Ehegatten, § 12.

the child till he proves its absolute impossibility.¹ In all other cases where the husband will not voluntarily acknowledge the child as his² the wife must prove its paternity.³ The wife's action against the husband for the acknowledgment of the child is termed action *de partu agnoscendo*.⁴ However, to prevent supposititious children, it is made the duty of the wife by the *Scutum Plancianum* (under Vespasian), if she at the time of divorce feel pregnant, to apprise the husband thereof within thirty days.⁵ Subsequently this was extended by the prætorian edict to the case when the marriage was dissolved by the husband's death; then notice must be given to the persons interested therein.⁶ If the notice be omitted to be given, though the wife cannot institute the action *de partu agnoscendo*, yet the child's rights may always be enforced.⁷

CONTINUATION.

§ 585. Legitimate children are entitled to claim from their parents sustenance and nurture conformable to their rank if they have not property of their own out of which they can maintain themselves.⁸ The father and mother of the child are first bound therefor; but in cases of necessity the grandparents are also bound.⁹ This duty to support, however, is mutual, *i. e.*, the children are bound to support their necessitous parents,¹⁰ and legitimate children and parents have a mutual right of inheritance.

II. OF ILLEGITIMATE PATERNITY AND FILIATION.

§ 586. By the Roman law illegitimate children were regarded as fatherless (*quasi sine patre filii*).¹¹ The consequence was that they could only claim

¹ fr. 6. D. 1. 6; Bülow, Abhandl. Pt. 2, No. 31.

² Const. 11. C. 5. 27; Novel 89. cap. 8. § 1.

³ If, however, one beget children with a woman with whom he could have lived in lawful marriage, and acknowledge such children in a public record, or in one written by himself and attested by three witnesses, or by his testament, or, judicially, by a record thereof, without adding that they are only natural children, then they are recognized as legitimate children and have all the rights of such children: Novel 117. c. 2; Auth. si quis. c. 5. 27.

⁴ This action was first introduced by the senatusconsultum Plancianum and only for the case of this senatusconsultum, fr. 1. D. 25. 3; but by a later senatusconsultum under Hadrian it was also permitted for the case of a child born during marriage: fr. 3. § 1. D. Ibid.; Gmelin, Über die Präjudicialklage *de partu agnoscendo*, Erlangen, 1781; Glück, Comm. Vol. 28, § 1285–1287, f.

⁵ Dig. 25. 3; Thibaut, System, §§ 473, 474; Glück, *supra*.

⁶ fr. 1. § 10. *seq.*, D. 25. 4.

⁷ fr. 1. §§ 6. 8. 15. D. 25. 3; fr. 1. § 15. D. 25. 4.

⁸ fr. 5. §§ 6. 7. D. 25. 3. See fr. 5. §§ 8. 11. D. 25. 3. For what is included in support, see fr. 234. § 2. D. 50. 16; fr. 6. § 5. D. 37. 10; fr. 1. § 19. D. 37. 9; Const. 9. C. 8. 47; Novel 117. c. 7.

⁹ fr. 5. § 2. fr. 8. D. 25. 3; Glück, Comm. Vol. 28, § 1289.

¹⁰ fr. 5. § 1. D. 25. 3; Glück, § 1290. Brothers and sisters are morally but not legally bound to support each other: Kind, Quæst. for. (Ed. II.), T. 4, c. 60; Weber, Von der nat. Verb. § 102; Hasse, Güterrecht, § 100; Glück, *supra*, § 1290, a. b.

¹¹ Ulpian, IV. § 2; Gaius, I. § 64; § 12. I. 1. 10; § 4. I. 3. 5; fr. 23. D. 1. 5.

support from their mother and her ascendants; but they had no claim against any one as their father for acknowledgment and support.¹

III. OF THE RIGHTS OF THE MOTHER AND FATHER RESPECTING THEIR CHILDREN.

§ 587. The parents are bound to maintain and rear their children; hence they have the right to determine the means by which this duty shall be performed.² From which follows—

1. The right to have the care of their physical and moral culture and to determine their future mode of life, wherein the children, however, always have a voice when they attain maturer years. After a divorce the judge determines by whom the children shall be reared.³ Yet the mother loses the right of rearing when entrusted to her if she marry again.⁴ The husband, as such, is always primarily liable for the cost of maintenance and rearing, be he the innocent or guilty party. The mother must maintain them only when she is rich and the father poor.⁵

2. They have the right to chastise the children so far as it may be requisite to their rearing, and in greater transgressions to deliver them to the authorities for punishment.⁶

¹ fr. 5. § 4. fr. 7. D. 25. 3. Justinian first gave to the natural children a right against their father for support: Novel 89. c. 12. 13; *Steyer*, *Disquis. ante jure Justiniano patri incumbat onus alendi spurios*, Rostock, 1817. Incestuous children could not themselves claim support from their mother: Auth. *Ex complexu* C. 5. 5; Novel 74. c. 6; Novel 89. c. 15; *Heise*, *de successoribus necessariis*, Göttingen, 1802. § 29-33. However, by the canon law and the present judicial usages, the child's mother and the child itself are allowed an action *de partu agnoscendo utilis* against their begetter and his heirs for the acknowledgment and nurture of the children. If the paternity cannot be proven or ascertained, then the mother and her ascendants alone are bound for the child's nurture, and when necessary the public charitable institutions must care for them. On the entire subject-matter, see *Glück*, *Comm. Vol. 28*, § 1288; *Busch*, *Von den Rechten geschwächter Frauenspersonen und der unehelichen Kinder*, Ilmenau, 1828; *Schüzler*, *Die Paternitäts-Alimenten- und Satisfactionsklagen*, 2d ed. Kassel, 1843; *Gelt*, *Über die rechtl. Verhältnisse bezüglich der außerehelichen Kinder*, 1 vol., Nördlingen, 1850.

² *Glabig*, *Über die Gründe und Gränzen der väterlichen Gewalt*, Dresden u. Leipzig, 1789; *Glück*, *Comm. Vol. 2*, §§ 137, 138.

³ The rule that the right of rearing belongs primarily to the father had an exception already in the Pandects, even where he had the paternal power, when the child's welfare required it: fr. 1. § 3. fr. 3. § 5. D. 43. 30, with which agrees Const. 1. C. 5. 24, wherein the determination is left to the judicial discretion. By Novel 117 c. 7. the rearing shall be entrusted specially to the mother if the father were the cause of the divorce, or the mother must maintain the children because the father cannot. See authorities cited in note 3.

⁴ Auth. *si pater* C. 5. 24. See Novel 94. c. 2.

⁵ Cod. 5. 25; Novel 117. cap. 7. Many believe otherwise because of Auth. *si pater* C. 5. 24, but as this differs with its sources it cannot decide (see *supra*, § 92).

⁶ Const. 3. C. 8. 47; Const. un. C. 9. 15.

CONTINUATION.

§ 588. The children, on their part, owe obedience and respect to their parents;¹ from which follows that they cannot institute infamous actions (*actiones famosæ*) against their parents,² and they cannot be compelled to be witnesses against them;³ and they can sue only for so much of their claims against their parents as shall leave the latter sufficient for the necessities of life (*in quantum facere possunt*).⁴

CHAPTER II.

OF THE NATURE AND ACQUISITION OF PATERNAL POWER.⁵

NATURE.

§ 589. The paternal power (*patria potestas*) is the summary of those peculiar rights which, by the Roman civil law, a man who is *sui juris* has over his sons and daughters, and also over his most remote descendants springing from him through males only. It has, especially by the ancient law, a great part of the effect which the master's power over the slave (*domini potestas*)⁶ begets (§ 600, *seq., infra*); but it was always distinguished from the latter in the following:

1. It does not belong to the legal relations of the *jus gentium*, but to those of the *jus civile*, and therefore it can appertain only to a Roman citizen,⁷ and only persons who have the Roman citizenship can hold such a relation.⁸

2. Only a male can possess it,⁹ not a woman or legal person.

3. The paternal power over one person can only be possessed by a single person.¹⁰

4. The person who is only subject to the paternal power (the *filiusfamilias* and the *filiafamilias*, family son and family daughter), by the ancient law, is not wholly without rights; he or she has the same political rights and duties as if he or she were *sui juris*.¹¹

5. In its acquisition (§ 590, *seq., infra*) and loss (§ 607, *seq., infra*) it

¹ fr. 1. § 2. fr. 9. 10. D. 37. 15; fr. 4. D. 27. 10; Const. 4. C. 8. 47.

² fr. 5. § 1. D. 37. 15; fr. 11. § 1. D. 4. 3; Const. 5. C. 2. 21.

³ fr. 4. 5. D. 22. 5.

⁴ § 38. I. 4. 6; fr. 7. § 1. D. 37. 15; fr. 16. D. 42. 1.

⁵ Gaius, I. § 55, *seq.*; Ulpian, tit. 5; Inst. 1. 9; Dig. 1. 6; Cod. 8. 47; *Donellus*, Comm. jur. civ. Lib. 2, cap. 20-27; *Heineccius*, Antiquit. Rom. Lib. 1, tit. 9, § 3-10; *Glück*, Comm. Vol. 2, § 132, *seq.*; *Gans*, Scholien zu Gaius, p. 85; *Hassold*, *Patriæ Romanor. potestatis*, Onoldi, 1833.

⁶ On these see § 131-133, *supra*.

⁷ Gaius, I. §§ 52, 55; Ulpian, X. § 3; § 2. I. 1. 9; §§ 1. 2. I. 1. 12.

⁸ Gaius, I. § 128; Ulpian, l. c.; §§ 1. 2. I. 1. 12.

⁹ Gaius, § 104; § 10. I. 1. 11.

¹⁰ On the other hand, the *domini potestas* may, in consequence of joint proprietorship or of the usufruct, etc., belong to several.

¹¹ fr. 9. D. 1. 6; fr. 3. D. 1. 7; fr. 13. § 5. fr. 14. pr. D. 36. 1.

differs from the *domini potestas*; the death as well as the *maxima* and *media capitis diminutio* (great and medium loss of status) of its possessor has a different influence on his destiny (§ 606, *infra*) than on that of the *domini potestas*.

ACQUISITION OF THE PATERNAL POWER GENERALLY.

§ 590. By the Justinian law the paternal power is acquired—

1. Naturally, by the begetting of children in lawful marriage.
2. Civilly, by adoption and legitimation.¹

I. ACQUISITION OF PATERNAL POWER BY THE BEGETTING OF CHILDREN IN LAWFUL MARRIAGE.

• § 591. The paternal power is acquired by the begetting of children in lawful marriage,² but to which it is requisite that the husband at the time of the procreation be *sui juris*;³ for if he be yet a family son (*filiusfamilias*) he does not acquire the paternal power over his children begotten in marriage, but that person does in whose power he stands.⁴ Yet on the death of that person, as also if he suffer a *maxima* (great) or *media capitis diminutio* (medium loss of status), it falls of right to the husband, provided that he by this event first becomes *sui juris*.⁵

II. ACQUISITION OF PATERNAL POWER BY ADOPTION.

A. NOTION AND KINDS.

§ 592. Adoption is a legal act whereby under public authority a person is adopted as a child or grandchild who was not previously in the paternal power of the adopter or had ceased to be.⁶ It is either *arrogatio*, when a man in his own right (*homo sui juris*) is adopted, or *datio in adoptionem* (given in adoption), when a *filiusfamilias* of him who has such person in his power is given to another for adoption.⁷

¹ The latter, which first arose under the Christian emperors, has similarity to the *causa probatus*, which arose through the *lex Aelia Sentia* and a *senatusconsultum*, but ceased on the abrogation of the *latina* and *dedititia libertas* under Justinian (§ 132, div. B. 2. *supra*). See *infra*, § 599, note 2.

² Gaius, I. § 55, *seq.*; Ulpian, tit. 5; pr. I. 1. 9; fr. 3. D. 1. 6; Donellus, Comm. jur. civ. Lib. 2, c. 20; Hasse, Güterrecht der Ehegatten, §§ 17, 29.

³ § 9. I. 1. 12; § 4. I. 1. 13. See § 589.

⁴ fr. 21. D. 48. 5; § 3. I. 1. 9; fr. 4. 5. D. 1. 6.

⁵ pr. I. 1. 12; fr. 5. D. 1. 6. See § 607, note 3.

⁶ Inst. I. 11; Dig. I. 7; Cod. 8. 48; Gaius, I. § 97–107; Ulpian, tit. 8; Donellus, Comm. jur. civ. Lib. 2, c. 22, 23; Glück, Comm. Vol. 2, § 148; Schmitt, Die Lehre von der Adoption, Jena, 1825; Schönberg, De adoptione, Berlin, 1860.

⁷ fr. 1. D. 1. 7. Difference between adopted child and foster child (*alumnus*): fr. 132. pr. D. 45. 1. On the *adoptio per testamentum*, not mentioned in the *Corpus Juris*, see Cicero in Bruto, c. 58; Suetonius in Cæsare, c. 83, in Augusto, c. 102, in Tiberio, c. 6, in Galba, c. 17; Tacitus, Annal. I. 8; Appian, De bell. civ. III. 14.

B. GENERAL PRINCIPLES.

§ 593. The general requisites for both kinds of adoption are—

Capability of the person who desires to adopt. The castrated cannot adopt, but the impotent can;² nor can any one adopt who is not at least eighteen years older than the one whom he desires to adopt.³ One cannot adopt another for only a limited time;⁴ but the adopted person may afterwards be again emancipated, but then the emancipated person cannot again be adopted.⁵ However, if a father emancipate his own child he may again adopt it.⁶ Females cannot adopt because they cannot have paternal power, but yet the regent may allow it to them as a solace for their lost children; but then they do not acquire paternal power.⁷ As adoption should be a means to the acquisition of paternal power, therefore one can adopt another not only as son or daughter, but also as grandson or granddaughter,⁸ but not as collateral kin and also especially not as brother.⁹

C. SPECIAL REQUISITES.

1. *Arrogation.*

§ 594. The special requisites for arrogation are—

1. The express agreement of the arrogator and the arrogates.¹⁰
2. The confirmation of the arrogation by the regent.¹¹

94; Dio Cassius, XLV. 5, XLVI. 47; *Cujas*, *Observ.* VII. 7; *Dirksen*, *Versuche zur Kritik und Auslegung der Quellen des R. Rechts*, p. 73. It only appears in connection with the institution of the adopted person as heir, and expresses the will of the testator that he shall assume his name as a son. Caesar and the first emperors designated by it the person whom they wished as their successor in the government.

¹ The passage, *adoptio imitatur naturam* (adoption is an imitation of nature), § 4. I. 1. 11, fr. 16. D. 1. 7, fr. 23. D. 28. 2, which explains several ordinances, is not carried out and cannot be regarded as a principle from which further inferences are to be drawn.

² § 9. I. 1. 11. and Theophilus ad h. §; fr. 2. § 1. fr. 40. § 2. D. 1. 7; fr. 6. D. 28. 2; Gaius, I. § 103; Ulpian, VIII. § 6.

³ § 4. I. 1. 11; fr. 40. § 1. D. 1. 7. Previously it was doubtful whether the adopter must be older: Gaius, I. § 106.

⁴ fr. 34. D. 1. 7.

⁵ fr. 37. § 1. D. 1. 7.

⁶ fr. 12. D. 1. 7.

⁷ § 10. I. 1. 11. and Theophilus ad. h. 1; Const. 5. C. 8. 48; Gaius, I. § 104; Ulpian, VIII. § 8. a.

⁸ § 7. I. 1. 11; fr. 6. fr. 37. pr. D. 1. 7. When one desires to adopt another as child or grandchild of a certain son, then the latter must consent, but it does not depend on the consent of the other agnates: § 7. I. 1. 11; fr. 6. 7. D. 1. 7.

⁹ Const. 7. C. 6. 24. See *Vangerow*, § 248.

¹⁰ fr. 2. pr. D. 1. 7. See § 593, note 8, *supra*.

¹¹ fr. 2. pr. D. 1. 7; § 1. I. 1. 11; Const. 6. C. 8. 48. This gradually arose under the heathen emperors. Previously the confirmation by the people took place in consequence of a *lex curiata*, after a previous investigation of the matter by the

3. A preceding governmental approval,¹ and herein the following rules govern:

a. They who have children of their own body or adopted children in their power in general cannot arrogate another child.

b. Usually one cannot arrogate several children.²

c. The arrogator must be aged at least sixty years, or for other reasons have no expectation of having children of his body, unless he desire to arrogate a near relation.³

d. The arrogation must not be made for a wrongful motive. The guardian, especially, shall not be permitted to arrogate his ward to avoid his accountability, and, generally, the poor cannot arrogate the rich.⁴

4. If the arrogatee be a minor,⁵ then the following rules govern:

a. It depends on the assent of the nearest kin and guardians.

b. The arrogator must give security (*satisfactio*) that in the event the minor should die before attaining his majority he will deliver his estate to his nearest kin or to the pupillary substitute named by the father.

c. If the arrogator emancipate the minor or disinherit him unjustly, then he must deliver to him not only all the estate which he brought with him and acquired in the interim, but the arrogator must also leave at his death a fourth part of his own property to him, which, from its originator, is named the *quarta Divi Pii*.⁶

d. The arrogated minor has the right to claim his emancipation after acquiring his majority if, after investigation, it be found beneficial to him.⁷

2. Proper Adoption (*datio in adoptionem*).

§ 595. The special requisites for proper adoption are—

1. The consent of the adopter.⁸

pontifices. From the questions then put to the arrogator, the arrogatee and to the *populus* came the name *arrogatio*. But after the assemblies of the *curies* (*comitia curiata*) became an empty form (§ 27, *supra*) everything lay here manifestly in the hands of the pontifices: Gellius, l. c.; Tacitus, Hist. I. 5; Gaius, I. § 99; Ulpian, tit. 8; Hugo, R. G. p. 150; Savigny, Verm. Schriften, Vol. 1, p. 197.

¹ This is not prescribed in the proper adoption (*datio in adoptionem*): Vangerow, § 249. Rem. 1.

² fr. 17. § 3. D. 1. 7.

³ fr. 17. § 2. D. 1. 7.

⁴ fr. 17. pr. § 7. D. 1. 7.

⁵ Previously minors and women could not be arrogated, partly because they did not belong to the *comitia* and partly because, as *homines sui juris*, they were under tutelage: Gellius, V. 19; Gaius, I. §§ 101, 102; Ulpian, VIII. § 5. Respecting women this was gradually changed entirely under the heathen emperors because both reasons ceased: fr. 21. D. 1. 7. Since, an *epistola* of Antoninus Pius to the pontifices minors may be arrogated, subject to special provisions and with special effect, which the text more precisely states.

⁶ § 3. l. 1. 11; fr. 17. § 1. fr. 18. 19. 20. 22. D. 1. 7; fr. 13. D. 38. 5; Const. 2. C. 8. 48; Ulpian, VIII. § 5; Gaius, I. § 102; Francke, Das Recht der Notherben, § 37.

⁷ fr. 32. pr. D. 1. 7.

⁸ See § 593, *supra*, note 8.

2. The consent of the previous possessor of the paternal power over the child to be adopted. The child itself, however, need not expressly consent; it is sufficient if it be present at the act of adoption and do not object.¹

3. The act of adoption must take place before a competent judge,² and consists in the declaration of the will of the parties thereto, and that a record be made thereof.³

D. EFFECT OF ADOPTION.

1. *Arrogation.*

§ 596. The effect of adoption and of arrogation consists in—

1. That the arrogator acquires the paternal power over the arrogatee and his children, so far as the latter remained in the arrogatee's power,⁴ a consequence of which was, in the older law, that the property which the arrogatee possessed at the time of the arrogation *ipso jure* vested in the arrogator. In the more modern law, and since the origin of the *peculium* properly belonging to the *filiusfamilias*, the arrogator acquires only those rights to the arrogatee's property which appertain to the blood father in his children's property.⁵

2. On the other hand, the arrogatee enters into all the rights of a *filiusfamilias*. He becomes agnate of all the agnates of the arrogator, and thereby acquires a right of inheritance as well in relation to the arrogator himself as to his agnates.⁶ The entry into the new family is generally connected with the departure out of the former family, and hence with a least loss of status (*minima capitis deminutio*).⁷

¹ fr. 5. D. 1. 7.

² All three persons named must here personally appear: Const. 11. C. 8. 48; fr. 25. § 1. D. 1. 7. By the most modern law this is declared to be unnecessary, because the *adoptio* is no longer *legis actio*: Buchholtz, Abhandl. p. 211, note 14.

³ This simple form is first prescribed by Justinian: Const. 11. C. 8. 48; § 1. I. 1. 11; § 8. I. 1. 12; fr. 2. pr. fr. 4. 36; D. 1. 7. Previously the form consisted in that the son by *tres emancipationes et duas intervenientes manumissiones* and other children by *mancipatio* were freed from the paternal power and brought into the *mancipium* (§§ 133, *supra*, 601, *infra*), then ceded *in jure* by the *extraneus*, who now had it in *mancipio*, or (what was more usual), after previous re-emancipation, to the hitherto possessor of the paternal power, who ceded the child as *filiusfamilias* to the adopted father *in jure*. The adoption, in a narrow sense, hence already prescribed at that time, was effected by means of the juridical authority (*imperio magistratus*), and could not, like the old arrogation, occur only in Rome: Cicero, de finib. I. 7; Suetonius in Octav. c. 64; Gellius, V. 19; Gaius, I. §§ 98. 100. 101. 132. 134; Ulpian, VIII. § 3-5; Scheurl, De modis liberos in adoptionem dandi, Erlangen, 1850.

⁴ fr. 2. § 2. fr. 15. pr. fr. 40. pr. D. 1. 7; fr. 3. pr. D. 4. 5; Ulpian, VIII. 8; Gaius, I. 107.

⁵ Gaius, III. § 82, *seq.*; § 6. I. 2. 9; Inst. 3. 10. (11).

⁶ fr. 23. D. 1. 7; § 2. I. 1. 11; § 2. 14. I. 3. 1; Const. 10. pr. § 5. C. 8. 48. See *infra*, § 668.

⁷ Gaius, I. § 162; fr. 3. pr. D. 4. 5.

2. *Proper Adoption* (datio in adoptionem).

§ 597. By the older law the proper adoption has the same effect as arrogation. The adoptee suffered a least loss of status because he departed out of the power in which he formerly was and out of the family to which he formerly belonged.¹ On the other hand, he entered into the power and therewith into the family of the adopting father,² i. e., he became the agnate of all of the latter's agnates.³ Justinian, by a new ordinance,⁴ prescribed the following:

1. If a father give for adoption the son or daughter of his blood, then the old effect shall take place only when the adopting father is a blood ascendant of the child (*adoptio plena*). Should he not be such ascendant, then the child shall remain in the power and the family of his blood father, the adopting father shall acquire no rights whatever over the child, and only when he dies during the adoption shall a right of intestate inheritance descend to the child like a *suus* (own child or grandchild) (*adoptio minus plena*).⁵

2. If a grandfather give his blood grandchild for adoption, then it will depend on that the grandchild at its blood grandfather's death, aside from the adoption, will be in a position to inherit to him *ab intestato*; in such case precisely the same rules apply as in the adoption of sons and daughters;⁶ but if it should not be in this position, then the old law will govern.⁷

3. *Adoption by a Female.*

§ 598. The adoption by a female never founds paternal power (§ 593, *supra*), but always has only the effect that the adopted child, in relation to alimentation, intestate inheritance and birthright portion, is regarded as a blood child of his adopted mother.⁸

¹ pr. I. 11; fr. 1. pr. D. 1. 7; § 13. I. 3. 1.

² fr. 4. § 10. D. 38. 10. His children already begotten at the time of the adoption do not enter into the adopted father's power, as in arrogation, but those begotten after the adoption do: fr. 2. § 2. fr. 40. pr. D. 1. 7; fr. 26. 27. D. 1. 7. That it depends on the point of time of procreation, and not of birth, follows from § 9. I. 1. 12.

³ § 2. I. 3. 2; fr. 4. § 10. fr. 5. D. 38. 10; fr. 23. D. 1. 7.

⁴ Const. 10. C. 8. 48; *contra*, *Schmitt*, Von der Adoption, § 48-54.

⁵ Const. 10. C. 8. 48. pr. § 1-3. Yet it must be remarked that the entire constitution speaks only of the case when a blood father or grandfather gives his descendants for adoption. When, therefore, one gives his adopted child to another for adoption, then such case is governed by the old law, be the new adopted father whom he may.

⁶ Const. 10. C. 8. 48. § 4. So that therefore in this case the paternal power only passes to the adopting father when he is a blood ascendant of the grandchild given in adoption, not also when he is a stranger (*extraneus*).

⁷ In this case the adopted father therefore always acquires the paternal power, be he ascendant or *extraneus*: Const. 10. § 4. C. 8. 48.

⁸ Const. 5. C. 8. 48. See *infra*, §§ 671, 707.

III. ACQUISITION OF THE PATERNAL POWER BY LEGITIMATION.

§ 599. Illegitimate children are not of right in their father's power, but by legitimation¹ they may be subjected to it.² Legitimation is that act of the civil law whereby illegitimate children are rendered partially or wholly equal to legitimate in respect to paternal power, kinship and inheritance.³

¹ *Donellus*, Comm. jur. civ. Lib. 2, c. 21; *De Piera*, Diss. de legitimatione sec. princ. jur. Rom., Leyden, 1823.

² On the former *causæ probatio*, whereby among other matters the paternal power was also acquired (§ 590, note 1), is to be remarked: By the *lex Aelia Sentia* the emancipated person whose emancipation is invalid because he is not aged thirty years, if he enter into an obligation "*liberorum querendorum causa*" with a Roman female citizen, or with a *latina coloniaria*, or with a woman who stands in the same position as he does, before seven Roman citizens, and beget with her a child, which becomes a year old (*anniculus*), and prove all this before the prætor, or, being a provincialist, before the governor, then he and his wife and child become free (if they are not already free) and become Roman citizens, and he acquires paternal power over the child. The *lex Junia Norbana* appears to designate these *causæ probatio* as a means whereby an emancipated person who, because at the time of the emancipation, not being aged thirty years, is only *latinus Junianus*, may, with his wife and child, acquire the *jus Quiritium* and he the paternal power over the child, and the *senatusconsultum Persicianum* extends it to all *latini Juniani*. In addition to these *causæ probatio*, which may be termed *liberorum causæ probatio*, arose another, through a *senatusconsultum*, after the *lex Aelia Sentia* and before Hadrian, which may be termed *erroris causæ probatio*. This had the same effect as the former, but was not limited to *latini*. The cases in which it was allowed had in common that a marriage was entered into between two persons who were not both Roman citizens, who in fact erred as to their condition, and by which marriage a child was begotten. One case was when one of the parties to a marriage, who was a Roman citizen, erroneously supposed that the other was also. A second case was when the husband was *latinus Juniana* and the wife was at least *latina*, but the marriage was not entered into before seven citizens because they had an erroneous notion respecting their station, in consequence of which they thought that such formality was unnecessary or ineffectual. The third case was when the declaration was made before seven citizens supposing that both parties were in the condition in which this declaration would be effectual, and one party, but not both, was in another condition. In the first of these three cases it did not necessarily depend on whether the child was aged one year. Whether it depended thereon in both the latter cases we have no information. The effect of the *erroris causæ probatio* was somewhat modified when one party was *deditiorum numero* (quasi conquered peregrines); then this party for his or her person remained in this relation, and if it were the husband, then, naturally, he could not also have the paternal power, but the other party and the children were not therefore set back. In the *Corpus juris* no passages are inserted on the one or the other *causæ probatio*. See thereon *Gaius*, I. §§ 29–32. 65–88; II. §§ 142. 143; III. §§ 5. 73; *Ulpian*, III. §§ 1. 3; *Coll. XVI.* 2. § 5; *Bethmann-Hollweg*, De *causæ probat.*, Berlin, 1820; *Gans*, *Scholien*, p. 108, *seq.*

³ This equalizing in part occurs in the legitimation by testament (see note 4, p. 453) and in the legitimation by presentation in court (see note 3, p. 453).

However, by the Roman law only concubine children (*liberi naturales*)¹ might be legitimated. There were three kinds of legitimation.

1. The legitimation by subsequent marriage (*legitimitio per subsequens matrimonium*), which consisted in the marriage of one to his concubine with whom he had begotten children in concubinage and formed a written marriage contract with her (*instrumenta dotalia*).²

2. The legitimation by presentation in court (*legitimitio per oblationem curiæ*), which occurred when the father appointed his natural son as decurion or married his natural daughter to a decurion.³

3. The legitimation by the prince's rescript (*per rescriptum principis*), when the regent, at the solicitation of the father of the natural children, by a rescript declared them legitimate. But the latter generally occurred only when the father could not enter into marriage with the mother, or for good reasons would not, and no legitimate children existed.⁴ Whether the legitimation resulted from marriage or from imperial rescript,⁵ it had all the

¹ At present, according to the canon law, other illegitimate children may undoubtedly be legitimated: c. 1. 13. X. 4. 17. See note 2.

² Constantine introduced it to ameliorate his severe prescript against concubine children, for the case when persons who at the time of the publication thereof lived in concubinage entered into marriage with each other within the prescribed time. Zeno prescribed a similar temporary arrangement: Const. 5. C. 5. 27. Anastasius introduced this legitimation as a permanent institute: Const. 6. C. 5. 27. Justinus repealed this ordinance, Const. 7. C. 5. 27, but Justinian reintroduced it and permitted a number of special arrangements on this matter: Const. 10. *seq.* C. 5. 27; § 13. I. 1. 10; Novel 12. c. 4; Novel 18. c. ult.; Novel 78 c. 3; Novel 89. c. 8. See *supra*, § 574, note 12, and on § 13. I. 1. 10. see *Vangerow*, § 255, Rem. 3, and the citations there. In this case it no longer depends at present on the written marriage contract. It is doubtful whether by the canon law the children begotten in adultery are legitimated by the subsequent marriage of the parents where this is possible (§ 555, *supra*, note 8). That *adulterini* may be legitimated by a rescript, according to cap. 13. X. 4. 17, is not doubtful.

³ Theodosius II. and Valentinian III. permit him who has no legitimate children to insert his concubine children in his testament unqualifiedly as his heirs: Const. 3. C. 5. 27. Leo also, in this case, calls the child to the intestate succession of the father's estate as if it were legitimate: Const. 4. C. 5. 27. Justinian repeats both of these, and extends it to the case when the father has legitimate children by a former marriage; but other rights of succession cannot be founded in this way: Const. 9. C. 5. 27. The Novels go no further, namely, Novel 36. Novel 89. c. 2, *seq.* See § 13. I. 1. 10.

⁴ Justinian first introduced it in the Novel 74. c. 1; Novel 87. c. 9. A particular kind of legitimation by rescript is the legitimation by testament, namely, when the father dies without having solicited a rescript for legitimation, but leaves a testament, wherein he names his natural child as heir and empowers him to effectuate such a rescript, and the child accepts such heirship, then, by obtaining such a rescript, the child can place itself fully into the position of a legitimate child: Novel 74. c. 2; Novel 89. c. 10. See *Vangerow*, § 256, Rem. 1.

⁵ The legitimation by presentation in court has less effect (see note 3). This kind of legitimation is not recognized by the Germans. On the other hand, in the

effect of arrogation; and besides which, the legitimated child entered into the same relations to the father and to all connected with him, as also to his simple cognates, as if it were his legitimate child. The effect of legitimation could only result with the legitimated child's assent.¹

CHAPTER III.

OF THE EFFECT OF PATERNAL POWER.

IN GENERAL.

§ 600. The paternal power, by the ancient Roman law, has in many respects the same effect as the power of the master over the slave.

1. The personal dependence of the family child on the father was great. See § 601, *infra*.

2. The property which was acquired through the family child belonged to the father the same as that which was acquired through the slave belonged to the master.² With the foregoing is connected that—

3. Between the family child and the father, as also between several family children who were subject to the same paternal power, many relations were impossible which, without the paternal power, might have existed. See § 606, *infra*.

4. The right over a free person not of the family might be acquired through a family son.³ Such right could not be acquired through a slave, nor could the family son acquire such right for himself, but only for the father, because, as the son was subject to another's power (*alieno juri sub-*

German law, in addition to the two kinds of perfect legitimation, there is still another special one wholly unknown to the Roman law, whose object and effect consists in that the disreputableness resting, according to German law, on illegitimate children (the stain of birth, the German *levis nota*), whereby they were incapable of being admitted into guilds or societies, was repealed, without the child thereby acquiring in relation to his father the rights and duties of a legitimate child. It results from a rescript which the child itself or its mother can effect without the father's consent: *Mittermaier*, Deutsch. P. R. § 60. On the present legitimation by the prince's rescript, in the case when legitimate children exist or a marriage with the mother was possible, see *Vangerow*, § 256, Rem. 1; *Glück*, Intestaterbf. 2d ed. p. 531.

¹ fr. 11. D. 1. 6; especially Novel 89. c. 11. pr. § 1. Many are of opinion that this passage is not applicable at present because of cap. 6. X. 4. 17.

² Gaius, II. § 86-96; III. § 163; Ulpian, XIX. § 18; Inst. II. 9; III. 28. (29). Hence the arrogator acquired the entire estate of the arrogatee by the arrogation. See *supra*, § 596.

³ Namely, the paternal power by procreation in marriage (§ 591, *supra*) and the right over the wife *in manu* (Gaius, II. § 159, III. § 3, Ulpian, XXII. § 14) through *usus* and perhaps through *confarreatio*. Only the *homo sui juris* (one in his own right) could adopt, and obviously only he could undertake a *coëmtio* or permit a freeman to emancipate himself so that he came into the *mancipium*.

jectus), he could not have another subject to his power.¹ But in the course of time, in consequence of milder customs, important changes took place in the relations under the 1st, 2d and 3d divisions, and only the rule in the 4th division so far as it relates to the acquisition of paternal power continued unaltered² (§ 591, *supra*). The first three relations will be more precisely considered hereafter.

I. THE FATHER'S RIGHTS IN RELATION TO THE PERSON OF THE CHILDREN.

§ 601. The rights which appertain to the father in relation to the person of the children in the most ancient period in the course of time in part wholly ceased, in part were modified and in part still exist in the Justinian law unchanged.

A. Rights that have ceased :

1. The right over the life and death of the children (*vitæ necisque potestas*),³ and, generally, the right of punishing for gross offences.⁴
2. The right to surrender a child for a theft or outrage committed by it (*jus noxæ dandi*).⁵

B. Rights that have nearly ceased: the right to sell the children, which was still permitted with newly-born children only in cases of the greatest want and necessity.⁶

¹ Generally it was not said of the wife of a family son that she is in *manu soceri*, but in *manu mariti*: Gaius, l. c.; Ulpian, l. c.

² Then the *manus* ceased. See *supra*, end of § 548, and particularly § 557, *supra*, note 4.

³ See Dionysius, II. 26, 27; Cicero pro domo, c. 29; Val. Max. V. 8. 9; Coll. IV. 8; fr. 11. in fin. D. 28. 2; fr. 5. D. 48. 9; fr. 2. D. 48. 8; Const. un. C. Th. 9. 15; Const. un. C. Just. 9. 17.

⁴ See Const. 3. C. 8. 47. of Severus Alexander; Const. un. C. 9. 15. of Valentinian and Valens. See the citations in note 3, and Seneca, de clem. 1. 15.

⁵ See Gaius, IV. § 75-79; Coll. II. 3; § 7. I. 4. 8; see also *supra*, § 478, note 1, and *infra*, note 6.

⁶ The alienation (*mancipatio*) of a *filiusfamilias*, which occurred often formerly, resulted sometimes for money and sometimes for form, because he was to be given in adoption or was to be emancipated (*imaginaria venditio, quæ dicis causa fit*), and sometimes for a delict (*noxæ causa*). An alienation of the first kind was declared invalid by Antoninus Caracalla in Const. 1. C. 7. 16. and by Diocletian and Maximian in Const. 1. C. 4. 43. and Const. 6. C. 8. 17, but was by Constantine, in Const. 2. C. 4. 43, restricted to the case in hand, in which the alienated child could again be released and not lose his status. See Paul, V. 1. § 1. The later provisions by Theodosius I. and Honorius in Const. 1. C. Th. 3. 3, and by Valentinian III. in Novel Valentinian 11 (in Jus Antejust. Novel 76), were not incorporated in Justinian's code. Both of the other kinds of alienation were repealed by Justinian. See note 5 and § 595, *supra*, and § 612, *infra*. By all three kinds of alienation of a family child (the second could also occur with equal efficacy in the case of a wife in *manu*, see *supra*, § 577, note 6), the child came into a particular kind of *alienum jus* (subjection to another), which was termed *mancipium* (§ 133, *supra*). The emancipated child was here, as

C. On the other hand, the father has still—

1. A right of discipline, and may chastise his children for minor offences,¹ and his consent is required on betrothing (*supra*, p. 411, note 2), on entering into marriage (*supra*, p. 417, note 2), or in divorce.²

2. A right to his children's services.³

3. The right of reclamation (*filii vindicatio*) against every one who detains from him a family child. He can also employ for this purpose the interdict *de liberis exhibendi* and the interdict *de liberis ducendis*.⁴

4. He can appoint testamentary guardians for his children (§ 622, *infra*), and if they by his death become *sui juris* and die in their minority, he may nominate testamentary heirs for them (*pupillaris substitutio*) (§ 721, *infra*).

II. EFFECT OF PATERNAL POWER ON THE CHILDREN'S RIGHTS OF PROPERTY.

A. NATURE AND KINDS OF PECULI.⁵

§ 602. By the ancient law a family child could not have property himself; everything which he acquired belonged to the father (note 2, p. 126, *supra*, § 600, note 2, *supra*). But the father often gave to the son, as also to his slave, a part of his estate, so that they might use it as their own or trade with it, and this was termed *peculium*, and is the oldest kind of *peculii*. Now it

in every subjection to another, incapable of having an estate of its own, and must perform slavish services in cases of the first and third kinds. In all three cases it was said he is a quasi slave (*servi loco*); therewith he remaining *ingenuus* and Roman citizen, but could only through *manumissio* in one of the three old forms rise out of the *mancipium*, without, however, being subjected to the restrictions of the *lex Aelia Sentia* and the *lex Furia Caninia*. The twelve tables prescribed that a son sold shall be first freed from the paternal power through the *manumissio sui juris* when he was sold for the third time. This did not refer to daughters, grandchildren, etc.; they became *sui juris* already through the first manumission. Whether it related to the son surrendered for the *noxæ* committed by him was doubted. The *fiducia* was always connected with the *imaginaria venditio, quæ dicis causa fit*. It was determined either that the emancipated son should be manumitted or he should be re-emancipated to the emancipator (a third kind of *fiducia* was that which occurred in the *coemptio fiduciæ causa*; here the re-emancipation was reserved to a third person). He who should be manumitted because of the *fiducia* could also by *censu* by his own act manumit himself. The *noxæ datus* also who liquidated the debt with labor could demand his manumission. The legitimate child begot by one in *mancipio* did not enter into the *mancipium*. If the begetter were not yet released from the power of his father the child came under it; otherwise, on the begetter's manumission, it came under his power, and when the latter died in *mancipio*, then it became *sui juris*. On the *mancipium*, see Gaius, I. §§ 116–123, 135, 138–141; II. §§ 86, 90, 96, 160; III. §§ 114, 163; Gans, Scholien, p. 151, *seq.*; Bæcking, *De mancipii causis*, Berlin, 1826.

¹ See note 4, p. 455.

² Novel 22. c. 19.

³ fr. 7. pr. D. 9. 2.

⁴ Dig. 43. 30; Cod. 8. 8.

⁵ *Galvanus*, *De usufructo*, cap. 7, § 5–11; *Glück*, *Comm. Vol. 14*, § 905–912; *Luden*, *de peculii secundum jus Romanor.*, Göttingen, 1835; *Glück*, *Comm. Vol. 14*, § 905–912.

is termed *peculium profectitium* (acquired from the father).¹ On the other hand, by the modern law the family child may have an estate for himself, and in respect to the manner of its acquisition²—

1. It may be either *castrense peculium*,³ which embraces everything that the family son acquired by war services; further, everything which he acquired from the circumstances resulting from war services, especially the movable property presented to him by his kin and friends on his departure for the camp; further, gifts and inheritances from his companions in war, and all that a family son who is a soldier received from his wife as heir, but not what he received from her as legatee; and, finally, all that is procured through the *castrense peculium*.⁴

2. Or *quasi castrense peculium*, which includes everything that a family child acquires as an officer of the state or court, or as an advocate or judicial solicitor, and by gifts from the regent or regentess, and also his entire acquisitions if he be of the clergy.⁵

3. But if the family child who is not of the clergy acquired otherwise it is now termed *peculium adventitium*, to which especially belong *bona materna et materni generis* of the child, what he receives from his wife,⁶ as also, according to the modern law, generally every acquisition which does not proceed from the father's estate and is not *castrense* or *quasi castrense peculium*.⁷

B. THE FATHER'S RIGHTS TO THE PECULIUM.

§ 603. The father's rights to the child's *peculium* differ according to the various kinds thereof.

1. The *peculium profectitium* is and remains the father's property. The son is only administrator of it, and what he acquires therewith is acquired for the father.⁸ On the other hand, the father, if he gave the son a *peculium*

¹ fr. 4. pr. § 2. fr. 5. § 4. fr. 7. § 3. fr. 8. 39. D. 15. 1.

² Const. 37. pr. C. 3. 23.

³ The rules mentioned here and in § 603, *infra*, existed at the time of the classical jurists. However, see end note 5.

⁴ fr. 3. 4. pr. fr. 8. fr. 11. fr. 16. § 1. fr. 19. pr. D. 49. 17; especially Const. 1. 4. C. 12. 37.

⁵ According to the ordinances of Constantine, Leo and Justinian: Const. un. C. 12. 31; Const. ult. C. 12. 37; Const. 7. C. 1. 51; Const. 4. 14. C. 2. 7; Const. 7. C. 6. 61; Const. 34. C. 1. 3; Novel 123. cap. 19. The oldest case belonging here, but not touched on in the text, is that of fr. 50. D. 36. 1, which generally is erroneously reckoned among the cases of the *peculii adventitii extraordinarii*, namely, the case when the father acts so unfaithfully with an inheritance, which he should *ex fidei commissio* restore to his family child after the dissolution of paternal power, that he must immediately restore it.

⁶ For these three kinds of acquisition the rules stated in § 603, div. 3, *infra*, were introduced by Constantine, Honorius and Theodosius II., whereupon Justinian generalized them in the manner stated.

⁷ § 1. 1. 2. 9; Const. 1. 2. C. 6. 60; Cod. 6. 61.

⁸ § 1. 1. 2. 9.

profectitium, may be sued for his debts which do not arise from generosity, in the action *de peculio*, to the extent of the *peculium*; ¹ and if the father allow him an unlimited administration he must suffer all onerous alienations out of the *peculium*, excepting gifts which he did not specially allow. ² The *peculium* becomes the son's if the father's goods have been sold by the *fiscus* for debt, ³ when the son passes out of the paternal power by the acquisition of a higher honor, ⁴ or when the father emancipates the son without withdrawing the *peculium*. ⁵

2. The *peculium castrense et quasi castrense*, ⁶ at least by the modern law, is the full and absolute property of the son, so that the father has not even the usufruct of it. ⁷ The son, in respect to it, is viewed as *paterfamilias*; ⁸ he has the free disposition of it as well during life as in the event of death, and he may also testamentate thereof; ⁹ and if he die intestate, then, at least by the modern law, his intestate heirs inherit to him according to the general principles of intestate succession. ¹⁰

3. The children have the property in the *peculio adventitio*. But the administration and usufruct during the paternal power generally belong to the father ¹¹ without liability for security or to account. ¹² The things appertaining to the *peculium* may be aliened without the children's consent only when debts or legacies are to be paid or when they are perishable; ¹³ otherwise, for the children's benefit, they are inalienable, and prescription does not run against them during the paternal power. ¹⁴ The children during the paternal power cannot dispose of such things without the father's consent, still less can they testamentate thereof. ¹⁵

CONTINUATION.

§ 604. The rule that the father has the administration and the usufruct of his children's *peculii adventitii* has an exception in the following cases :

¹ § 4. I. 4. 7; Dig. 15. 1; Cod. 4. 26. See *supra*, § 515.

² fr. 18. § 4. fr. 19. D. 13. 7; fr. 7. pr. § 1-4. D. 39. 5.

³ fr. 3. § 4. in fin. D. 4. 4.

⁴ Novel 81. c. 1. § 1.

⁵ fr. 31. § 2. D. 39. 5; § 20. I. 2. 20; Const. 17. C. 8. 54.

⁶ Dig. 49. 17; Cod. 12. 27; *Glück*, Comm. Vol. 14, § 906; but especially Vol. 34, p. 101-117.

⁷ Const. 6. pr. Const. 7. C. 6. 61.

⁸ fr. 1. § 3. fr. 2. D. 14. 6; fr. 17. D. 40. 1.

⁹ fr. 4. D. 5. 1; Const. 2. C. 12. 37; Ulpian, XX. § 10; § 6. I. 2. 11; pr. I. 2. 12.

¹⁰ pr. I. 2. 12; Const. 34. C. 1. 3; Novel 118. On the law of Novel 18. see *Glück*, Comm. Vol. 35, p. 192, *seq.*, note 31; *Vangerow*, § 409, IV.

¹¹ § 2. I. 2. 9; Const. 1. C. 6. 60; Const. 6. pr. C. 6. 61.

¹² Const. 6. § 2. Const. 8. § 4. in fin. C. 6. 61.

¹³ Const. 1. 2. C. 6. 60; Const. 4. Const. 8. §§ 4. 5. C. 6. 61.

¹⁴ Const. 1. C. 6. 60; Const. 4. C. 6. 61; Const. 1. § 2. C. 7. 40; Novel 22. c. 24. Respecting their legal hypotheca on the father's property, see *supra*, § 344.

¹⁵ Const. 8. § 5. C. 6. 61; pr. I. 2. 12. On the succession to the *peculium adventitium*, see *Rosshirt*, *Erbrecht*, § 14-17.

1. When the child accepts an inheritance, legacy or a gift contrary to the father's desire.¹

2. When one gives a child something or voluntarily bequeaths to it something on condition that the father shall not have the usual rights to it.²

3. When the child simultaneously with the father inherits *ab intestato* to a brother or sister of the whole blood.³

4. When the mother's estate descends in parts to the children because both parents dissolved their marriage by mutual consent without sufficient cause.⁴ What the child acquires in these four ways as absolute property, at present is termed *peculium adventitium extraordinarium*. The child may freely dispose of it while living, but cannot testamentate thereof.⁵

C. THE FATHER'S RIGHTS TO THE ESTATE OF HIS CHILDREN NOT SUBJECT TO HIS POWER.

§ 605. Generally the father has the legal usufruct of the estate only of such children as are in his power and only so long as they remain therein.⁶ But this rule has the following exceptions:

1. When a married woman dies and leaves descendants common to herself and her surviving husband, but who are not in the latter's power, then the husband shall have the usufruct in a poll portion of such estate as the descendants inherit from her *ab intestato*.⁷

2. When the father emancipates his child, then, by the ancient law,⁸ he may retain as his property a third of the *peculii adventitii* as the price of emancipation. On the other hand, by the modern law, he shall not retain anything as his property, but instead of it, even after the child's emancipation, shall have the usufruct for life in the one-half of the hitherto *peculii adventitii*.⁹

¹ Const. 8. pr. §§ 1. 3. C. 6. 61.

² Novel 117. c. 2. pr. § 1.

³ Novel 118. c. 2.

⁴ Novel 134. c. 11. See *supra*, § 579; note 6, p. 138.

⁵ Const. 11. C. 6. 22; Novel 117. c. 1; *Glück*, Comm. Vol. 34, p. 123.

⁶ The latter is doubted because of the undecided case in the sources, when a family child which has an *adventitium ordinarium* passes out of the paternal power through full adoption (*adoptio plena*) and enters into that of the adopted father. Generally it is considered that here the rights of the parent in that estate pass to the adopted father: *Vangerow*, § 236, Rem. 3.

⁷ Const. 3. C. 6. 60 (Const. 9. C. Th. 8. 18) of Theodosius II. and Valentinian III.; *Donellus*, Comm. jur. civ. Lib. 9, c. 2; *Vangerow*, Vol. 2, § 415, Rem. 2. The views of the foregoing writers differ as to how the portion to which the usufruct applies is to be determined when the descendants in question are wholly or in part grandchildren or great-grandchildren, etc., and on the question whether the ordinance refers to the case of testamentary succession because in Cod. Just. the passage "*si uxor intestata defecerit*" is omitted.

⁸ According to Constantine's ordinances, namely, Const. 1. § 2. Const. 2. C. Th. 8. 18.

⁹ According to Justinian's Const. 6. § 3. C. 6. 61; § 2. I. 2. 9. But at present

3. When a family child dies leaving a *peculii adventitii ordinarii* and is inherited to *ab intestato*, and the possessor of the paternal power is excluded from the intestate succession by descendants or nearer ascendants of the child, then the father retains the whole of the hitherto usufruct, even when the intestate heirs are not in his paternal power.¹

III. OF RELATIONS NOT PERMITTED BECAUSE OF THE PATERNAL POWER.

§ 606. In consequence of the paternal power—

1. An ordinary legal suit² cannot occur between father and family child or between two family children of the same father,³ nor can there be an actionable obligation between them,⁴ but a moral obligation (*naturalis obligatio*) with specially limited effect may.⁵ This rule of the Justinian law still exists, but it has an exception in the *castrense* and *quasi castrense peculium*,⁶ and in many cases an *extraordinaria cognitio* (special jurisdiction) was allowed as early as the time of the classical jurists.⁷

2. The family father cannot generally⁸ make a valid gift to the family child, nor can he do so according to the Justinian law.⁹ However, a gift invalid for this reason is cured if the donee pass from the paternal power by the father's death, or by emancipation, or by the acquisition of an honor, without the gift being revoked.¹⁰ The *filiusfamilias* cannot witness his family father's testament.¹¹

this is not the rule when the daughter, by marriage, or the son, by setting up his own household, passes out of the paternal power (§ 613, *infra*).

¹ According to ordinances of Theodosius II. and Valentinian III. and of Justinian. See *infra*, § 674, last note.

² A preliminary investigation on the question whether one party stands in the paternal power of the other is of course allowed: fr. 1. § 2. D. 6. 1. See also *infra*, note 7.

³ fr. 4. 11. D. 5. 1; fr. 16. D. 47. 2.

⁴ § 6. I. 3. 19. (20); fr. 16. cit.

⁵ fr. 38. D. 12. 6; fr. 56. § 1. D. 46. 1.

⁶ fr. 2. pr. D. 18. 1.

⁷ *E. g.*, because of support (§ 585, *supra*), or because of emancipation (§ 610, *infra*).

⁸ Those movables which the father presents to a departing family son who is a soldier immediately become *castrense peculium*: fr. 31. § 2. D. 39. 5; Const. 4. C. 3. 36.

⁹ fr. 1. § 1. D. 41. 6; Cod. 5. 16.

¹⁰ Const. 17. pr. C. 8. 54; Const. 25. C. 5. 16. See Const. 6. § 2. C. 6. 61.

¹¹ §§ 9. 10. I. 2. 10; fr. 20. pr. § 1-3. D. 28. 1; Gaius, II. § 105-108; Ulpian, XX. § 3.

CHAPTER IV.

OF THE ENDING OF THE PATERNAL POWER.¹

I. BY THE FATHER'S OR CHILD'S DEATH.

§ 607. The paternal power ceases—

1. When the *paterfamilias* who possesses it dies, or if he suffer a *maxima* or *media capitis deminutio* (loss of status).² In either event his sons and daughters become *sui juris*. On the other hand, the grandchildren fall into their father's power, unless the father be dead or they had already passed from the paternal power.³

2. When the child subjected to the power dies or suffers a *maxima* or *media capitis deminutio*.⁴

II. DURING THE LIFE OF BOTH FATHER AND SON.

§ 608. Besides the foregoing, the rule is that the paternal power continues so long as the father and son live, if no especial cause arise by the civil law wherefore it ceases during the life of both.⁵ Such a cause is either from a legal prescript or the father's will.

A. ACCORDING TO LEGAL PRESCRIPT.

§ 609. The paternal power is dissolved without the father's consent—

1. *Ipso jure*, when the son acquires a high station.⁶

2. When the father is guilty of certain forbidden acts, namely, when the father enters into an incestuous marriage, the paternal power, *ipso jure*, ceases,⁷ and when he endeavors to force his daughter to prostitute her person, there-

¹ Inst. 1. 12; Dig. 1. 7; Cod. 8. 49; Ulpian, tit. 10 §§ 2. 3; Gaius, I. § 127-137; Paul, II. 25; *Donellus*, Comm. jur. civ. Lib. 2, c. 26, 27.

² Because only a Roman citizen could have paternal power: § 2. I. 1. 9; §§ 1. 2. I. 1. 12; Gaius, I. §§ 128, 129; Ulpian, § 3. See *supra*, § 589.

³ pr. I. 1. 12; fr. 5. D. 1. 6. See fr. 41. D. 1. 7; Gaius, I. § 127; Ulpian, X. § 2. It is only when one passes from the paternal power on account of an honor conferred (§ 608, *infra*), hence suffers no *capitis deminutio*, that his children do not become *sui juris* on their grandfather's death, but fall into their father's power: Novel 81. c. 2.

⁴ Because only a Roman citizen can be in the paternal power of another: Ulpian, X. § 3; § 1. I. 1. 12. See *supra*, § 589.

⁵ This does not include when the father or son is expatriated, § 2. I. 1. 12; fr. 4. fr. 7. § 3. fr. 14. § 1. fr. 15. D. 48. 22, and the disinherison of the child does not dissolve the paternal power: fr. 20. pr. D. 37. 4.

⁶ Formerly only certain priestly honors freed him from the paternal power: Gaius, I. § 130; III. § 114; Ulpian, X. § 5. Subsequently this consequence resulted from a number of other high spiritual and temporal offices and honors: § 4. I. 1. 12; Const. 66. C. 10. 31; Const. 6. C. 12. 3; Novel 81. cap. 2.

⁷ Novel 12. cap. 2.

upon she can demand that the paternal power shall cease.¹ In all these cases the child does not suffer a least loss of status.²

B. WITH THE FATHER'S CONSENT.

§ 610. The paternal power ceases with the father's consent—

1. When he permits himself to be arrogated or legitimated, in which case the power over his children, together with the power over himself, passes to the arrogator or legitimating blood father (§§ 596, 599, *supra*).

2. When he transfers the paternal power over his child to the adopted father by proper adoption (§ 597, *supra*).³

3. When he emancipates his child. In the first and second cases the child always, and in the third usually, suffers a least loss of status.

OF EMANCIPATION PARTICULARLY.

1. Nature.

§ 611. Emancipation is that act whereby the father releases his child from his paternal power with the view that the child shall become *sui juris*.⁴ Thereto is requisite—

1. The father's consent, because he cannot be compelled to emancipate⁵ excepting for excessive severity to the child,⁶ or when he accepted a legacy on condition that he would emancipate his child,⁷ or when an arrogated minor after his majority, for good reasons, demands his emancipation.⁸

2. The child's consent, because the father cannot emancipate the child without his consent,⁹ unless he is still an infant¹⁰ or is an adopted child.¹¹

3. Observance of the legal form.

¹ Const. 6. C. 11. 40; Const. 12. C. 1. 4. To this is usually added the case of a father abandoning his child (foundling), according to Const. 2. 4. C. 8. 52. and Novel 153. c. 1 (non-gloss.).

² See, especially, Novel 81. c. 2.

³ Similar cases were by the earlier law, as when the *filiafamilias* came in *manum* (§ 557, *supra*, note 4), or when any family child was brought into the *mancipium*; but in such case generally the son was first freed from the paternal power by the third mancipation (§ 601, *supra*, note 6). Before Justinian the rules for the dissolution of the paternal power by *mancipatio* also specially applied to the proper adoption and to the *emancipatio*. See § 595, note 3, p. 450, § 601, *supra*, note 6, and § 612, *infra*, note 1.

⁴ Gaius, I. § 132-134; Ulpian, X. § 1; Paul, II. § 25; § 6-10. I. 1. 12; Dig. 1. 7; Cod. 8. 49; Glück, Comm. Vol. 2, § 157; Marchant, Diss. de emancipatione, Leyden, 1822.

⁵ § 10. I. 1. 12; fr. 31. D. 1. 7.

⁶ fr. 5. D. 37. 12.

⁷ fr. 92. D. 35. 1.

⁸ fr. 32. pr. D. 1. 7. See *supra*, § 594.

⁹ Paul, lib. 2. tit. 25. § 5; Const. 5. C. 8. 49; especially Novel 89. c. 11. pr. The paternal power does not cease by the repudiation of the child (*abdicatio*): Const. 6. C. 8. 47.

¹⁰ Const. 5. in fin. C. 8. 49.

¹¹ Const. 10. pr. C. 8. 48; § 3. I. 11; fr. 132. pr. D. 45. 1. On the restrictions in the emancipation of an arrogated *impubes*, see *supra*, § 594.

2. *Form of the Emancipation.*

§ 612. In relation to the form, by the modern Roman law¹ there are still two kinds of emancipation:

1. The *emancipatio Anastasiana*, when the father, with the child's consent, prays the regent for a prescript whereby the child shall be declared *sui juris*.²

2. The *emancipatio Justiniana*, when the father, before a competent judge, releases a non-objecting child from his power.³

3. *Effect of Emancipation.*

§ 613. The effect of emancipation is to render the emancipated person *sui juris*. He generally suffers a least loss of status as he passes out of the family to which he hitherto belonged and loses his agnatic rights therein.⁴ But in the *emancipatio Anastasiana* they may be reserved to him by the prescript.⁵ When, however, the emancipated person is disobedient to his father or causes him severe injuries he may be redrawn into his power as a punishment.⁶

¹ The oldest and originally only kind of emancipation was that of three fictitious sales following each manumission (*per imaginarias venditiones et intercedentes manumissiones*), which appeared to be similar to the old proper adoption, and was distinguished from it in the closing act, which, in emancipation, consisted not in a *jure cessio* to the adopter, but in a *manumissio* (generally by *vindicta*). When the emancipator desired to manumit his child himself (*parens manumissor*), then the closing act preceded a *remancipatio*, like the closing act of the proper adoption; but when he desired to leave the manumission to the purchaser of the certificate (*extraneus manumissor*), then the *remancipatio* was omitted. Since the introduction of the *emancipatio Anastasiana* there was a choice between this and the old form, till Justinian abolished it and instituted the *emancipatio Justiniana* in its stead: Const. C. C. 8. 49; § 6. I. 1. 12. See thereon Ulpian, X. § 1; Gaius, § 132-134.

² Const. 5. C. 8. 49.

³ Const. 6. C. 8. 49; *Schulting*, ad Gaium in jurispru. Antej. p. 57.

⁴ fr. 3. § 1. D. 4. 5.

⁵ Const. 11. C. 6. 58.

⁶ Const. 1. C. 8. 50. By the German law the paternal power ceases of right if the daughter marry or the son set up his own household: *Höpfer*, Comm. § 163. As this is usually the case, it is evident why the formal emancipation so seldom occurs with them. The attaining of their majority by children, however, just as little dissolves the paternal power with them, according to the common law, as the acquisition of an honor or a state office in which the son is not immediately put in the position of beginning his own household, as what Justinian ordained respecting certain officers and honors (§ 609, note 6) at present is only applicable to episcopal honors.

SECTION THIRD.

OF GUARDIANSHIP.

SOURCES.—Gaius, I. § 142–200; Ulpian, tit. 11; Cod. Theod. Lib. 3. tit. 17–19; Inst. Lib. I. tit. 13–26; Dig. Lib. 26. 27; Cod. Just. Lib. 5. tit. 28–52.

LITERATURE.—*Donellus*, Comm. jur. civ. Lib. 3, Lib. 15, cap. 18–22; *Faber*, Jurisprudentiæ Papinianæ scientia ad ordinem institutionum efformata (Lyons, 1658), Lib. I. tit. 13–26; *Huber*, Digress. Justin. P. 1, Lib. 3, c. 1–6, c. 11–26; *Noodt*, Commentar. ad Dig. libr. 26 et 27, in his works, Cologne, 1763, p. 412; *Seger*, Histor. juris Romani de tutelis et curationibus, Leipsic, 1760, and in his works edited by *Klueber*, Erlangen, 1788, Vol. 1, pp. 61 and 111; *Gans*, Scholien zum Gajus, p. 178, seq.; *Wichers*, Diss. ad locum Gaji de tutelis, Groningen, 1822; *Minguet*, Historia juris Romani de tutelis, Groningen, 1826; *Nilant*, Diss. de jure tutelari ex lege XII. tabb., Groningen, 1827; *Zimmern*, R. G. Vol. 1, § 223, seq.; *Glück*, Comm. Vol. 28, p. 435, to Vol. 33, p. 310; *Rudorff*, Das Recht der Vormundschaft, 3 vols., Berlin, 1832–1834; *Le Fort*, Essai historique de la tutelle en droit Romain, Geneva, 1850. See also *Kraut*, Die Vormundschaft nach den Grundsätzen des deutschen Rechts., 2 vols., Göttingen, 1835–1847.

NATURE AND KINDS OF GUARDIANSHIP.

§ 614. Guardianship is generally the right and duty to protect and represent such persons as, on account of their youth or for other causes, are regarded as needing protection; to assist and represent them in their legal transactions, and to manage their estate. In the Roman law there are two different kinds of guardianship, namely, *tutela*, tutorship, and *cura*, curatorship.¹

CHAPTER I.

OF TUTORSHIP.

I. NATURE OF TUTORSHIP.

§ 615. Tutorship of minors (*tutela impuberum*),² by the Roman law, is the power and right of a Roman citizen to supply by his authority the de-

¹ *Mayer*, Von den Unterschieden Zwischen Tutel und Curatel, Frankfort A. M. 1803; *Glück*, Comm. Vol. 29, p. 1, seq.; *Reits*, De differentia tutelæ et curæ apud Romanos, Utrecht, 1821; *Zoepl*, Vergleichung der röm. Tutel und Cura mit der heut. Vormundschaft, Bamberg u. Aschaffenburg, 1828.

² In the ancient Roman law there were two kinds of tutorship, the tutorship of minors (*tutela impuberum*) and the tutorship of females (*tutela feminarum*). In the Justinian law only the former appears, and therefore this alone is treated in the text. On sex-tutorship see, especially, *Livy*, XXXIX. § 9; *Gaius*, I. §§ 144. 145. 149–154. 157. 166. 168–176. 180. 181. 184. 190–196; II. § 118; III. § 43. seq.; *Ulpian*, tit. 11. §§ 1. 5–8. 17–22. 24. 25. 27. 28, tit. 20. § 15, tit. 29. § 3; *Otto*, Diss. de perpetua feminarum tutela, in his Diss. jur., Utrecht, 1723, P. 1; *Savigny*, Verm. Schriften, Vol. 1, No. 10; *Rudorff*, Recht der Vormundschaft, Vol. 1, § 6, Vol. 2,

claration of will of a minor Roman citizen who is *sui juris* in his legal acts, to fully represent him therein where this is allowed (§ 629, *infra*), and to manage his estate.¹ From an original right of the nearest legal heirs of the minor, or of him on whom the father by virtue of his paternal power by his last will conferred it, at a subsequent period it became a public duty (*munus publicum*), which every person to whom for any legal reason it was offered (§ 621, *infra*) had to accept.² But its characteristics representing and supplying the legal personality of a minor in his legal acts connected with the management of his estate continued in the modern law the same as formerly.³ The person to whom it is given is termed tutor;⁴ the subject of it is termed pupil, who can only be an *homo sui juris* and one already born.⁵ The tutorship of minors is legally necessary, i. e., it does not depend on the pupil's will whether he shall have a tutor or not.⁶

II. QUALIFICATIONS FOR TUTORSHIP.⁷

§ 616. The tutor must be qualified for the tutorship. Unqualified are—

1. Slaves and non-Romans.⁸

§ 121. By the twelve tables and later laws (§ 625, *infra*) all Roman female adult citizens who are *sui juris*, excepting the vestals, shall be under this tutorship. But they were not thereby deprived of the management of their estate, as minors were, and, moreover, they required the tutor's authority only for certain acts. In the course of time the dependence of minor women on their tutors was diminished; and, by the *lex Julia et Papia Poppæa*, every *ingenua* who had three and every *libertina* who had four children was wholly free from tutorship, and by the *lex Claudia de tutela feminarum*, the *legitima agnatorum* tutorship, which was very burdensome for women, as to them was abolished. With these important modifications the institute still existed at the time of Gaius and Ulpian, and a trace of it of the time of Diocletian is to be found in Const. 1. C. 5. 30. At a later period it ceased to exist, without its being known when.

¹ fr. 1. pr. § 1. D. 26. 1; §§ 1. 2. I. 1. 13; *Rudorff*, Vol. 1, §§ 4 and 8. See also the authors cited in § 614, note 1.

² fr. 1. §§ 3. 4. fr. 18. § 1. D. 50. 4; fr. 1. pr. D. 26. 7.

³ fr. 14. D. 26. 2. The tutor is appointed for the legal personality of the pupil, whom he should represent in all transactions in which the pupil must act himself. He is not appointed (with rare exceptions) for single transactions of the pupil, but for his whole estate, and for all transactions relating to it: § 17. I. 1. 25; fr. 12. 13. D. 26. 2. See *Savigny*, Vom Beruf unserer Zeit für Gesetzgebung, p. 104; *Rudorff*, *supra*, Vol. 1, p. 287, *seq.*, p. 378.

⁴ fr. 1. § 1. D. 26. 1; § 2. I. 1. 3.

⁵ fr. 239. pr. D. 50. 16; fr. 1. pr. D. 26. 1; fr. 161. D. 50. 16; fr. 30. D. 26. 5; fr. 19. § 2. D. 26. 2.

⁶ fr. 6. D. 26. 5; Const. 2. C. 5. 60.

⁷ *Glück*, Comm. Vol. 29, § 1300; *Rudorff*, Vol. 2, § 64, *seq.*

⁸ Const. 7. C. 5. 34. However, the father may appoint his own slave as tutor for his child, in which case the slave becomes free: § 1. I. 1. 14. *Pergrini* were therefore unqualified, because Roman citizens only may be tutors (*jus proprium civium Romanorum*): § 1. I. 1. 13. comp. with § 4. I. 1. 22; *contra*, *Rudorff*, Vol. 1, p. 7,

2. Females,¹ excepting the mother and grandmother, who, according to the modern law, are preferably entitled to the tutorship of their children and grandchildren.²

3. Maniacs and lunatics,³ and judicially-declared squanderers.⁴

4. Deaf and dumb.⁵

5. Minors.⁶

6. Bishops and monks.⁷

7. Soldiers in actual service.⁸

8. Enemies of the pupil or the father thereof.⁹

9. Every one who with money strives for the tutorship.¹⁰

10. Every one who at the time that the tutorship is offered to him has claims against the pupil's estate or between whom and the pupil an obligation exists. The pupil's mother and grandmother are, however, excepted.¹¹

11. Every one whose appointment as tutor was forbidden by the pupil's mother or father.¹²

12. A Jew cannot be a Christian's tutor.¹³ In addition to the foregoing, the following distinctions are to be observed: The tutorship cannot be conferred on those specified under divisions 1, 2, 5, 6, 7, 12, and those under the other divisions shall only not be permitted to exercise the tutorship. Generally they themselves must state their inability; but should this not be done, then the government must depose them.¹⁴

Vol. 2, p. 18, who remarks that *Peregrini* were at least qualified and bound for the Dative tutorship. The former *latini Juniani* were not wholly excluded: Gaius, l. § 23; Ulpian, XI. § 16.

¹ fr. 16. pr. fr. 18. D. 26. 1; Const. 1. 2. C. 5. 35.

² Novel 94; Novel 118. cap. 5. The earlier ordinances on the maternal guardianship, see in *Rudorff*, Vol. 1, § 33. See also § 624, notes 1, 2, p. 471. That the mother is entitled to the tutorship of her illegitimate children, according to Const. 3. C. 5. 35. and Novel 94. c. 1. in fin., is not doubted, and this is assented to by *Rudorff*, *supra*.

³ § 2. I. 1. 14; fr. 17. D. 26. 1.

⁴ § 3. I. 1. 23; fr. 1. pr. D. 27. 10.

⁵ Because they cannot interpose their authority: fr. 1. §§ 2. 3. D. 26. 1. Hence the blind are not absolutely incapable: fr. 16. D. 26. 8; fr. 40. D. 27. 1.

⁶ § 13. I. 1. 25; Const. 5. C. 5. 30. A family son may be a tutor if he attain his majority: pr. I. 1. 14; fr. 7. D. 26. 1.

⁷ Const. 52. C. 1. 3; Novel 123. cap. 5. § 1.

⁸ § 14. I. 1. 25; fr. 8. D. 27. 1; Const. 4. C. 5. 34.

⁹ § 11. I. 1. 25; fr. 3. § 12. D. 26. 10; fr. 6. § 17. D. 27. 1.

¹⁰ fr. 21. § 6. D. 26. 5.

¹¹ Novel 72. cap. 1. 2. 3. 4; Novel 94. cap. 1; *Glück*, Vol. 29, p. 98, *seq.*

¹² fr. 21. § 2. D. 26. 5. See fr. 8. pr. D. 26. 2.

¹³ The ancient law appears to permit them: fr. 15. § 6. D. 27. 1. But, by the modern law, the Jew is incapable for the reason that he cannot fill a public office: Const. 19. pr. C. 1. 9.

¹⁴ See the law cited and the writings quoted in note 7, p. 465, and *Vangerow*, § 270.

III. EXCUSES FROM TUTORSHIP.¹

§ 617. As tutorship, by the modern law, is a public duty, hence generally every one to whom it rightfully has been offered is bound to accept.² There are, however, several legal reasons for which one may avoid the tutorship, and these reasons are, in the Roman law, termed *excusationes*.³ On the other hand, by the Justinian law one can no longer escape the office of guardian by *potioris nominatio* (the naming by the tutor of another in his stead).⁴

CONTINUATION.

§ 618. The excuses respecting tutorship are of two kinds. Several give only the right to refuse a tendered tutorship. An excuse of this kind have—

1. Every one in Rome who has three, in Italy four, or in the provinces five, blood, legitimate living children.⁵

2. Those who are aged more than seventy years.⁶

3. Those who are absent on state affairs, in relation to tutorships that have been tendered to them during their absence or within a year after their return.⁷

4. Those who fill a governmental office.⁸

5. All public teachers of the liberal arts and sciences, as also practicing physicians.⁹

6. The administrator of the fiscal and patrimonial property of the regent.¹⁰

¹ Inst. l. 25; Dig. 27. 1; Cod. 5. tit. 62–69; Paul, lib. 2. tit. 27–30; Fragm. Vatic. § 128–247; *Cujas*, Comm. ad tit. Dig. de excusationibus, in his works, T. 1, p. 1033; *Jenichen*, Diss. de excusationibus tutorum, etc., Giessen, 1755; *Glück*, Comm. Vols. 31, 32, § 1354, seq.; *Rudorff*, Vol. 2, § 75, seq.

² Excepting the mother and grandmother, who may accept the tutorship or not: Novel 94. c. 1; Novel 118. c. 5.

³ In the Roman law *excusare* was sometimes used for *prohibere*, e. g., fr. 1. § 3. D. 3. 1, fr. 11. D. 50. 2, and so also in relation to tutorship in §§ 11. 13. 14. I. 1. 25. Hence the moderns usually distinguish between necessary and voluntary excuse. The first refers to the incapacity of the tutor, the latter to excuse in its true sense. See § 616, *supra*, note 14. In § 618, seq., only the voluntary excuses are referred to.

⁴ In other public duties this is undoubtedly permissible: Cod. 10. 65; fr. 7. pr. D. 50. 4; Const. 12. C. 5. 34. Formerly this was so in tutorship, especially that ordered by the government. See Paul, cited in note 1, but particularly the Fragm. Vat. §§ 157–167. 206–219. 242. 246; *Buchholz*, Diss. ad orat. D. Severi de potioribus nominandis, Regiom. 1824; *Glück*, Comm. Vol. 32, p. 142, seq.; *Rudorff*, Vol. 2, p. 7, seq., p. 161, seq., p. 184, seq.

⁵ pr. I. 1. 25; fr. 2. § 2–8. fr. 18. fr. 36. § 1. D. 27. 1; Const. 1. C. 5. 66; Fragm. Vat. §§ 168–170. 191–199. 247. See *Heineccius*, Ad Leg. Jul. et Pap. Popp. lib. 2, c. 8.

⁶ § 13. I. 1. 25; fr. 2. pr. D. 27. 1; fr. 3. D. 50. 6; Const. un. C. 5. 68.

⁷ § 2. I. 1. 25; fr. 10. pr. § 2. D. 27. 1; Const. 2. C. 5. 64.

⁸ § 3. I. 1. 25.

⁹ § 15. I. 1. 25; fr. 6. § 1–9. D. 27. 1; Const. 6. C. 10. 52; fr. 6. § 4. D. 27. 1.

¹⁰ § 1. I. 1. 25; fr. 22. § 1. fr. 41. pr. D. 27. 1.

7. Those who are not domiciliated at the place where they have been appointed tutors.¹

8. Those who have been named as tutors merely out of hatred to the father.²

9. When there are already three tutorships administered in the same family, which are all conducted at the risk of the *paterfamilias*, and are not unimportant, and were not sought, then no member of the family is compelled to undertake a fourth.³

CONTINUATION.

§ 619. Other excuses entitle one to resign a tutorship already undertaken; thus—

1. Every one is entitled to resign who from poverty or sickness is unable to perform its duties,⁴ or,

2. When the regent, knowing that one is a tutor, expressly permits him to change his domicile.⁵

3. Every one who is in the regent's counsel.⁶

4. Every one who must be absent on state affairs may demand that the tutorship which he administers shall be managed by a curator till his return.⁷

CONTINUATION.

§ 620. These excuses are available for tutors whether testamentary, legal or dative (§ 621, *infra*), yet they must be made known to the proper authorities within fifty days from the moment of knowledge of the appointment to tutorship.⁸ Excuses also cease if he who was appointed tutor promised the child's father that he would not use his available excuses,⁹ or if he wrote the last testament by which he was named as tutor,¹⁰ or if he undertook the administration without availing himself of his excuses,¹¹ or if he accepted something which was given to him in consideration of his being tutor.¹²

¹ fr. 46. § 2. D. 27. 1.

² § 9. I. 1. 25.

³ § 5. I. 1. 25; fr. 2. § 9. fr. 3-5. fr. 15. § 15. fr. 17. pr. fr. 31. § 4. D. 27. 1; Const. un. C. 5. 69.

⁴ § 6. I. 1. 25; fr. 7. fr. 40. § 1. D. 27. 1; Const. un. C. 5. 67.

⁵ fr. 12. § 1. D. 27. 1.

⁶ fr. 30. pr. D. 27. 1; fr. 11. § 2. D. 4. 4.

⁷ § 2. I. 1. 25; fr. 10. pr. § 2. D. 27. 1; fr. 11. § 2. D. 4. 4; Const. 1. C. 5. 64. If he go beyond the sea, he may demand to be wholly released: fr. 11. § 2. D. 4. 4.

⁸ § 16. I. 1. 25; fr. 2. § 5. fr. 13. §§ 1. 2. fr. 30. § 2. fr. 45. § 1. D. 27. 1; Const. 9. C. 5. 34. He who lives more than 400 miles from the seat of the government shall be given an additional day for each twenty miles beyond such number: fr. 13. § 2. D. 27. 1. To carry this into effect a term of four months from the day on which the fifty days began to run was counted: fr. 38. 39. D. 27. 1.

⁹ § 9. I. 1. 25; fr. 15. § 1. D. 27. 1.

¹⁰ fr. 29. D. 26. 2; fr. 15. § 1. D. 48. 19.

¹¹ Const. 2. C. 5. 63.

¹² fr. 5. § 2. D. 34. 9.

IV. ORIGIN OF THE TUTORSHIP.

§ 621. Tutorship is founded either—

1. On testamentary appointment (*testamentaria tutela*);
2. On legal prescript (*legitima tutela*); or,
3. By direction of the government (*dativa tutela*).¹ A tutorship founded on convention does not exist in the Roman law.²

A. TESTAMENTARY TUTORSHIP.³

§ 622. Testamentary tutorship, by the Roman law, rests on the following principles:

1. Only the possessor of the paternal power⁴ has the right in the event of death to nominate a tutor for his minor children and grandchildren, and for those only who are absolutely in his power at the time of his death, and therefore become *sui juris* afterwards.⁵

2. The tutor must be nominated in a testament or confirmed codicil;⁶ but it may take effect immediately, or be subject to a condition from a certain day (*ex die*), or till a certain day (*in diem*), or without any designation of time.⁷ But the person nominated must be a certain person, even at the time of nomination.⁸

3. One who was capable of being nominated in a proper way as testamentary tutor was termed by the Romans *tutor recte datus*.⁹ He acquired the right to the tutorship *ipso jure* without requiring governmental sanction, and was absolved from giving security (*satisfactio*).¹⁰

¹ By the twelve tables the tutorship of minor as well as of adult females referred only to the first two kinds. The third kind was introduced subsequently.

² For § 9. I. 1. 25. and fr. 15. § 1. D. 27. 1. only say that no excuse that might arise could avail him who promised the minor's father that he would accept the tutorship proffered for any legal reason: *Heineccius*, Diss. de tutela pactitia s. conventionali, Leipsic, 1777; *Rudorff*, Vol. 1, § 45.

³ *Gaius*, I. § 144, seq.; *Ulpian*, tit. 11. 14, seq.; *Inst.* 1. 14; *Dig.* 26. 2; *Cod.* 5. 28; fr. 120. D. 50. 16; *Glück*, Comm. Vol. 29, p. 197; *Rudorff*, Vol. 1, § 35–40.

⁴ So long as tutorship of adult females existed, then the husband who had the wife in *manu*, or, if he at the time the *manus* arose were still in the paternal power and died before his father, then the father, could nominate a testamentary tutor: *Gaius*, I. § 148, seq. Such husband could also give his wife the choice of tutor (*tutoris optio*), who was then called *optivus* tutor, and considered as a testamentary tutor, contradistinguished from whom was the usual testamentary tutor under the name of *dativus* tutor: *Gaius*, § 150–154.

⁵ § 3. I. 1. 13; fr. 73. § 1. D. 50. 17; fr. 1. § 1. fr. 4. D. 26. 2. The father could also appoint by testament a tutor for a posthumous child, provided that such child became *sui juris* by the father's death: § 4. I. 1. 13.

⁶ fr. 3. D. 26. 2; *Const.* 2. C. 5. 28.

⁷ §§ 1. 2. 3. I. 1. 14; fr. 8. § 2. fr. 10. §§ 3. 4. D. 26. 2; fr. 11. D. 26. 1.

⁸ § 27. I. 2. 20; fr. 20. pr. fr. 30. D. 26. 2; *Rudorff*, Vol. 1, § 38.

⁹ fr. 1. § 1. D. 26. 3.

¹⁰ fr. 7. fr. 17–19. D. 26. 2; *Gaius*, I. § 200. On the present law see § 627, *infra*, note 2.

CONTINUATION.

§ 623. The effect of the testamentary tutorship mentioned (§ 622, div. 3, *supra*) occurred only when the tutor was properly appointed (*recte datus*); therefore, not when he who nominated the tutor had no paternal power over the child, or when he who had paternal power over it did not nominate the tutor in a testament or confirmed codicil. However, by the modern Roman law the government in many cases must confirm such tutor improperly appointed (*non recte datus*), sometimes absolutely, sometimes after previous investigation, and sometimes after security is given; hence a distinction at present is made between perfect testamentary tutorship (*tutela testamentaria perfecta*), as the valid testamentary tutorship of the Roman law is termed, and imperfect testamentary tutorship (*tutela testamentaria imperfecta*), whereby is meant those cases in which some requisite is wanting. In the imperfect testamentary tutorship,¹ by the Roman law, the following cases are now to be distinguished:

A. Those in which a tutor improperly appointed without inquisition and security must be confirmed, which include—

1. When the father appointed a tutor for his emancipated son who was not instituted in the testament.

2. When the father appointed a tutor by an invalid testament or codicil not confirmed.²

B. Those in which was required for the confirmation an investigation, but not security, which include—

1. When the father nominated a tutor for his natural son to whom he left something.³

2. When the mother appointed a tutor for her child testamentarily instituted as heir.⁴

C. Those in which investigation and security are required, which include, when one appointed a tutor for a minor whom he instituted as his heir and which minor had no estate.⁵

B. LEGAL TUTORSHIP.⁶

§ 624. The legal tutorship rests on the principle that the nearest male intestate heir of the minor should primarily be called to the tutorship.⁷

¹ Dig. 26. 3; Cod. 5. 29; Glück, Comm. Vol. 29, p. 253, *seq.*; Rudorff, Vol. 1, § 41-44.

² fr. 1. §§ 1. 2. D. 26. 3.

³ fr. 7. D. 26. 3.

⁴ fr. 4. D. 26. 2; fr. 1. § 2. fr. 2. pr. D. 26. 3; fr. 4. D. 26. 6; Const. 1. C. 5. 29. These passages contradict Const. 4. C. 5. 28. if we with Cujas and the most modern writers do not erase the *non* before *instituerit*, which in many manuscripts is lacking.

⁵ fr. 4. 5. D. 26. 3.

⁶ Gaius, I. § 155, *seq.*; Ulpian, XI. § 3, *seq.*; Inst. I. tit. 15-19; Dig. 26. 4; Cod. 5. 30; Novel 118. c. 5; Schott, Diss. de tutela legitima, Utrecht, 1723; Schroeter, De nexu tutelæ, Jena, 1820; Glück, Comm. Vol. 29, § 315, *seq.*; Rosshirt, Erbrecht, p. 458; Rudorff, Vol. 1, § 27-34.

⁷ pr. I. 1. 17. See Rudorff, Vol. 1, § 31.

However, the mother¹ and grandmother of the minor, if they will accept the tutorship, are preferred to all collateral kin.² Several equally near intestate heirs have an equal right and equal duty to the tutorship, and in the event that the nearest heir should be absolutely and always incapable of being tutor, then the tutorship is acquired by the next nearest.³ The legal tutor, *ipso jure*, also acquires the right of tutorship without requiring the governmental confirmation.⁴

C. DATIVE TUTORSHIP (*appointed by the government*).⁵

§ 625. On tutorship by governmental appointment⁶ is to be remarked—

1. That only those governmental officers have the right to appoint tutors to whom this right was given by special law. This law the Romans varied greatly at all times.⁷

2. Every one is entitled to propose to the government for the appointment of a tutor⁸ who is interested that the minor shall have one;⁹ and in the

¹ Under the earlier emperors the mother was sometimes by a privilege permitted, fr. 18. D. 26. 1, against the rule of fr. 26. D. 26. 2. Valentinian II., Theodosius and Arcadius gave her, under certain conditions, a claim to the tutorship: Const. 2. C. 5. 35. The most recent general ordinance thereon is contained in Novel 118. c. 5, in which such claim is also allowed to the grandmother.

² She must, however, on the undertaking of the tutorship, renounce the benefit of the *Setum Velleianum*, and must lose the tutorship on marrying again: Const. 3. C. 5. 35; Novel 94; Novel 118. c. 5. See Rudorff, Vol. 1, p. 260; see also *supra*, § 616, note 2, p. 466.

³ fr. 3. § 9. D. 26. 4. Should he be only temporarily incapacitated, then the government named a tutor for the interim (§ 626, *infra*). In the former *legitima mulierum tutela* it was remarkable that the next agnate could cede *in jure* to a remote agnate, the patron could cede *in jure* to his descendants, etc., the administration of the tutorship (*cessitia tutela*, *cessitus tutor*): Gaius, I. § 168–172; Ulpian, XI. § 6–8.

⁴ Gaius, I. § 200.

⁵ Gaius, I. § 184, *seq.*; Ulpian, XI. § 18, *seq.*; Inst. 1. 20; Dig. 26. 5; Cod. Th. 3. 17; Cod. 5. 34; *Heineccius*, Antiq. Rom. Lib. 1, tit. 15, § 9–15; *Glück*, Comm. Vol. 29, p. 400, *seq.*; Rudorff, Vol. 1, § 46–51.

⁶ It is not mentioned in the twelve tables (§ 621, *supra*, note 1). Among the pre-scripts whereby it was afterwards introduced are, particularly important, the *lex Attilia* of the fifth century of the state, by which, in Rome, every pupil and every woman who lacks a testamentary or a statutory tutor shall have tutors nominated for them by the *Prætor urbanus*, with the consent of the majority of the tribunes (*Atilianus tutor*), and the *lex Julia et Titia*, whereby the provisions of the *lex Attilia* were extended to the provinces, in which the stadtholder shall nominate. See Gaius, Ulpian et Inst. l. c. and *Dirksen*, Verm. Schriften, Vol. 1, No. 1.

⁷ fr. 6. § 2. D. 26. 1; fr. 77. D. 50. 17. See the sources cited in the preceding note.

⁸ Dig. 26. 6; Cod. Th. 3. 18; Cod. 5. 31; *Glück*, Vol. 30, p. 78; Rudorff, Vol. 1, § 56–58.

⁹ fr. 2. pr. D. 26. 6.

event that the pupil's mother or grandmother, or their nearest intestate heirs, will not or cannot undertake the tutorship themselves, they are specially bound to procure the appointment of a tutor under the penalty of the loss of their right of inheritance,¹ if they have no special excuse.²

RELATION OF THESE THREE KINDS OF TUTORSHIP TO EACH OTHER.

§ 626. The relation of these three kinds of tutorship to each other is determined by the following rules :

1. The testamentary tutorship precedes all others.³
2. If the testamentary tutorship be temporarily obstructed, but it is expected that the obstruction will cease, then, till the obstacle is removed, the statutory tutor does not assume his office, but the government appoints a tutor or curator for the interim.
3. The same takes place if the statutory tutor be temporarily prevented from assuming the tutorship.⁴
4. If, on the other hand, the testamentary tutor named do not undertake the tutorship, or, having undertaken it, ceases to be tutor, then is to be distinguished whether the government concurred therein and appointed another in his stead;⁵ if it did not concur, then the statutory tutor assumes the office.⁶
5. If no testamentary tutor be appointed, then the tutorship vests immediately in the statutory tutor,⁷ and in default of the latter the government appoints one.⁸
6. In default of the next appointed statutory tutor the question whether the remoter tutor succeeds him or whether the government must appoint a tutor depends on the distinction named in division 4.⁹
7. If one of several testamentary tutors cease to be tutor, then the government appoints another in his stead; but if they all cease to be tutors without the concurrence of the government, then the statutory tutor assumes office.¹⁰
8. The remoter statutory tutor never succeeds one of several nearer statutory tutors, but the government must always appoint a successor, provided that his hitherto co-guardians are incompetent.

¹ fr. 2. § 1. D. 26. 6; Const. 10. C. 6. 58; Const. 6. C. 6. 56.

² fr. 2. §§ 26. 27. 28. 45. 46. D. 38. 17; Const. 2. C. 2. 35; Const. 3. C. 6. 56; Const. 8. C. 6. 31.

³ fr. 11. pr. D. 26. 2; Novel 118. c. 5.

⁴ *E. g.*, § 1. I. 1. 20; fr. 11. pr. D. 26. 2; fr. 10. § 7. D. 27. 1; § 5. I. 1. 23.

⁵ *E. g.*, fr. 11. §§ 1. 2. D. 26. 2.

⁶ fr. 11. § 3. D. 26. 2.

⁷ pr. I. 1. 15.

⁸ pr. I. 1. 20.

⁹ fr. 3. §§ 8. 9. fr. 4. D. 26. 4; fr. 10. § 7. D. 27. 1.

¹⁰ fr. 11. § 4. D. 26. 2.

V. THE TUTOR'S RIGHTS AND DUTIES.

A. UNDERTAKING OF TUTORSHIP.

§ 627. Every tutor called to the tutorship, if he do not properly excuse himself, must undertake it from the moment that he is apprised of his appointment. In default thereof, he is liable for all damages to the pupil that may arise from such neglect.¹ The government, according to the prætorian edict, must care for the pupil's protection by surety, from which, by the Roman law, only the testamentary tutors and those appointed by the high officials after a previous investigation are exempt.² By the modern law every tutor must be sworn.³

B. AFTER THE UNDERTAKING OF TUTORSHIP.

1. *Care of the Pupil's Rearing.*

§ 628. The rights and duties of the tutor during the tutorship, by the modern law, relate partly to the pupil's physical person, partly to his legal personality in the legal transactions undertaken by him,⁴ and partly to the management of his estate.⁵ Among the duties of the first kind is particularly the duty under governmental supervision to care for the pupil's culture and rearing conformable to his station.⁶

1. The amount of the annual expenses to be applied thereto is determined by the pupil's father or not. The father's determination governs when no injury to the pupil is feared from it.⁷ In default of the father the government determines the amount.⁸

2. The person by whom the pupil is to be reared is likewise either determined by the father or not. In the former, if no hazard attend it, the father designates the person to rear the pupil.⁹ But if there be hazard, the rearing next devolves upon the mother if she do not marry again. If the mother be dead, or if the pupil's kin or tutor deem it hazardous to entrust her with the

¹ fr. 1. § 1. fr. 7. pr. D. 26. 7. See fr. 5. § 10. fr. 39. § 6. fr. 58. § 2. D. 26. 7; Const. 1. C. 5. 28; Const. 15. C. 5. 62; Const. 1. 3. C. 5. 63.

² Gaius, I. § 199; Inst. 1. 24; Cod. 5. 42; *Rudorff*, Vol. 2, §§ 106, 107. By the German common law no tutor is exempt therefrom.

³ Justinian prescribed this for the curatorship of the insane in Const. 7. § 4-7. C. 5. 70; c. 27. C. 1. 4; but in general, and especially in tutorship, in Novel 72. cap. 8: *Rudorff*, § 108.

⁴ See thereon § 629, *infra*.

⁵ This management of property or business will be more particularly treated in § 647, *infra*.

⁶ Dig. 27. 2: Cod. 5. 49. and 50; *Glück*, Comm. Vol. 30, p. 217, Vol. 32, p. 155, *seq.*; *Rudorff*, Vol. 2, §§ 115, 116.

⁷ fr. 2. § 3. D. 27. 2.

⁸ fr. 3. pr. D. 27. 2.

⁹ fr. 1. § 1. D. *Ibid.* See fr. 5. D. 27. 2.

rearing, then the government determines with which of them the pupil shall live and be reared, and such person is thereupon bound to undertake it.¹

2. *Authority of the Tutor.*²

§ 629. By the Roman law the tutor's chief duty consists in protection of the pupil, *i. e.*, that he must either wholly represent the pupil's legal personality in his lawful acts or supply it by his authority, and thereby protect him against the harm which otherwise might result from either the total lack of, or at least imperfect, legal capacity to act.³ Hence so long as the pupil is *infans* and consequently cannot act himself, the tutor must represent him in such lawful acts as cannot be omitted without harm to the pupil (*negotia pupilli gerere debet*); but as soon as the pupil has become *infantia major*, hence can act himself, the imperfect legal personality, *i. e.*, the pupil's imperfect will, must be supplied by the tutor by consenting to the pupil's transactions (*auctoritatem interponere s. auctor fieri debet*).⁴ This authority

1. Is requisite in all the transactions of the pupil which effect a change of his status, or whereby something of his is relinquished, or any of his rights are conceded to another, or an obligation is assumed by him. Such authority is not requisite to a transaction whereby the pupil acquires only rights or is released from obligations.⁵ If the authority be wanting where it is requisite, then, by the strict civil law, the transaction is invalid, and if it depend on mutual performances, he can sue thereon, but cannot be sued.⁶ But if the

¹ Const. 1. 2. C. 5. 49; Novel 22. cap. 38.

² Inst. 1. 21; Dig. 26. 8; Cod. 5. 59; Glück, Comm. Vol. 30, p. 424, *seq.*; Rudorff, Vol. 1, § 4, Vol. 2, § 120-127.

³ fr. 30. D. 26. 7. See Rudorff, Vol. 1, p. 32, Vol. 2, § 146.

⁴ §§ 9. 10. I. 3. 19. (20); fr. 1. § 2. fr. 2. pr. D. 26. 7; Const. 18. § 2. C. 6. 30. But here only a pupil is referred to, *i. e.*, of an *impubes sui juris* who is under tutorship, fr. 239. D. 50. 16, as an impubescent who is under paternal power is wholly incapable to conclude a lawful transaction for himself: § 10. I. 3. 19. (20); fr. 141. § 2. D. 45. 1. The *paterfamilias* may command (*jussus*) him to enter into a transaction (as he may command any pubescent who is subject to his power), but the father himself is bound thereby: fr. 8. § 1. fr. 25. § 4. D. 29. 2; fr. 1. § 4. D. 14. 1; fr. 7. § 2. D. 14. 2. See Rudorff, Vol. 1, p. 170-174.

⁵ pr. § 1. I. 1. 21; fr. 9. pr. D. 26. 8.

⁶ pr. I. 1. 21; fr. 13. § 29. D. 19. 1. However, by obligatorial transactions, to which only the tutor's authority is wanting, a moral obligation arises with specially restricted effect: § 3. I. 3. 29. (30); fr. 42. pr. D. 12. 2; fr. 21. pr. D. 35. 2; fr. 64. D. 36. 1; fr. 25. § 1. D. 36. 2; fr. 19. § 4. D. 39. 5; fr. 1. § 13. D. 44. 7; fr. 127. D. 45. 1; fr. 25. D. 46. 1; fr. 1. § 1. D. 46. 2; fr. 44. 95. §§ 2. 4. D. 46. 3. However, the views are very dissimilar because of fr. 41. D. 12. 6. and fr. 59. D. 44. 7. See Savigny, Obligationenrecht, § 10; Schultze, De natur. obl. pupill., Gryph. 1853; Glück, Comm. Vol. 4, p. 66, *seq.* The pupil cannot effectually sue in mutual transactions entered into by him without the tutor's authority when he has not fulfilled his promise. See fr. 3. § 4. D. 3. 5; fr. 7. § 1. D. 18. 5. By a rescript of Antoninus Pius a pupil may be sued on a transaction entered into without the tutor's au-

tutor have interposed his authority, then, by the strict civil law, the transaction binds the pupil; however, if he be injured by it, he may still pray for *in integrum restitutio*.¹

2. Every tutor is clothed with authority, even the honorary one.²

3. If, however, the tutor himself, or a person subject to his power, have entered into a transaction with the pupil, he cannot validate this with his authority (*tutor in rem suam auctor esse non potest*); but if there be no co-tutor, then for such transaction in general there must be appointed a curator, who undertakes it instead of the pupil.³

4. The form of the tutor's authority requires that he shall be present at the undertaking of the transaction; that he immediately, verbally,⁴ without force⁵ and unconditionally, consent.⁶

If one of these requisites be lacking, the authority is invalid.⁷

Protutor and False Tutor.

§ 630. Every one who is not a tutor, but yet acts as such, is generally termed *protutor* or false tutor; but, in a narrower sense, there is the following distinction:

1. When one not the tutor manages the property of a pupil he is termed *protutor*, i. e., *qui pro tutore negotia gerit* (who transacts business for a tutor),⁸

authority for what he is enriched by it: fr. 5. pr. D. 26. 8. See fr. 3. § 4. fr. 6. pr. fr. 34. fr. 37. pr. D. 3. 5; fr. 3. pr. D. 13. 6; fr. 10. D. 14. 3; fr. 8. § 15. D. 16. 1; fr. 1. § 15. D. 16. 3; fr. 1. pr. D. 26. 8; fr. 66. D. 46. 3. In the former sex-tutorship the tutor's authority was not so generally requisite: Ulpian, XI. § 27. See also Cicero, Top. c. 11. pro Flacco c. 34. 35. pro Cæc. c. 25; Gaius, I. §§ 176. 178. 180. 184. 192. 195; II. §§ 47. 80. 81. 85; III. § 171; *Rudorff*, Vol. 2, § 121. In the course of time it came that the majority of the tutors of minor women could be compelled to give their sanction: Cic. pro Mur. c. 12; Gaius, I. §§ 190. 192; II. § 122; *Rudorff*, Vol. 1, § 6.

¹ fr. 16. pr. D. 4. 4; Const. 2. C. 2. 25. See *supra*, § 226, *seq.*

² fr. 49. D. 29. 2. He on whom the testator by his testament conferred the tutorship as an honor is termed *honorarius tutor*, and he is exempted from the duty of management. He is termed *notitum causæ datus* who is to make known to his co-tutors matters concerning the estate unknown to them: fr. 26. § 1. fr. 32. § 1. D. 26. 2; fr. 3. § 2. D. 26. 7; fr. 14. §§ 1. 6. D. 46. 3; Const. 1. C. 5. 38. How the authority is to be regarded when a pupil has several tutors, see Const. 5. C. 5. 59. comp. with fr. 4. fr. 5. § 2. D. 26. 8; fr. 14. §§ 1. 2. fr. 100. D. 46. 3.

³ § 3. I. 1. 21; fr. 1. § 13. D. 36. 1; fr. 5. pr. § 2. fr. 18. D. 26. 8; Const. 5. C. 4. 38; Novel 72. cap. 2; *Rudorff*, Vol. 2, § 125. Should, however, the tutor become interested in the transaction as a consequence only, then he may authorize: fr. 1. pr. fr. 7. pr. § 2. D. 26. 8.

⁴ § 2. I. 1. 21; fr. 9. § 5. D. 26. 8.

⁵ fr. 1. § 1. fr. 17. D. 26. 8.

⁶ fr. 8. D. 26. 8.

⁷ fr. 2. D. 26. 8; § 2. I. 1. 21.

⁸ Dig. 27. 5; Cod. 5. 45; *Glück*, Comm. Vol. 32, p. 293, *seq.*, and p. 341, *seq.*; *Rudorff*, Vol. 2, § 124, Vol. 3, § 157.

and if he acted as the tutor, he has the same duties as the real tutor (§ 649, *infra*, note 3). The pupil may insist on his immediate removal as soon as it appears that he is not the real tutor.¹

2. But when one, not being the actual tutor, interposes his authority in the lawful transactions of a pupil, he is termed false tutor.² With respect to the pupil, this is to be regarded as if the transaction were undertaken without a tutor, and is only valid to the extent that the pupil's transactions undertaken without a tutor are valid.³

VI. ENDING OF THE TUTORSHIP.⁴

A. RIGHTFULLY.

§ 631. Tutorship ceases rightfully—

1. When the pupil attains puberty or dies or suffers a loss of status.⁵
2. When the tutor dies or loses his freedom or citizenship.⁶
3. When he was appointed for a certain period of time only, or till the performance of a condition, and the time has matured or the condition has been performed.⁷
4. When the mother or grandmother who administers the tutorship of her children or grandchildren marries again.⁸

B. BY JUDICIAL PERMISSION.

§ 632. The judge permits the tutorship to end—

1. At the tutor's instance, if there be such an excuse as would have released him from a tutorship already assumed (§ 619, *supra*).
2. Against the tutor's will, if he be suspected of not performing his duty with proper fidelity, or if he only give cause to fear this, and his removal is therefore necessary or at least advisable.⁹

¹ fr. 4. fr. 1. § 3. D. 27. 5.

² Dig. 27. 6; Fragm. Vatic. § 1.

³ pr. I. 1. 21.

⁴ Inst. 1-22; Cod. 5. 60; *Rudorff*, Vol. 3, § 201, *seq.*

⁵ pr. §§ 1. 3. 4. I. 1. 22; fr. 4. pr. D. 27. 3; fr. 14. pr. § 1. D. 26. 1; Const. 1. 3. C. 5. 60.

⁶ § 4. I. 1. 22. The *legitima tutela*, in its narrow sense, *i. e.*, such statutory tutorship as is founded on the twelve tables, also ceases on the least loss of status of the tutor: Ulpian, XI. § 9; § 4. I. 1. 22. (On fr. 7. pr. D. 4. 5, see *Glück*, Vol. 31, p. 141, *seq.*; *Rudorff*, Vol. 3, p. 238.) At present, by the common law, this is applicable only when the tutor was appointed because of his adopted kinship.

⁷ § 25. I. 1. 22; fr. 14. §§ 3. 5. D. 26. 1.

⁸ Const. 2. 3. C. 5. 35; Novel 94. c. 2; Novel 118. c. 5.

⁹ § 6. I. 1. 22. The Roman *suspecti remotio*, which could only arise with a guardian who had to administer, hence not with the former kind of tutor of a female who had attained puberty, generally preceded a public complaint (*tutoris suspecti causatio s. postulatio*); however, the inquisition procedure was permitted already at the time of the later classical jurists: fr. 3. §§ 4. 12. fr. 12. D. 26. 10. By the twelve tables the procedure was initiated by a *legis actio*: pr. I. 4. 10. Subse-

CHAPTER II.

OF THE CURATORSHIP.

I. NATURE.¹

§ 633. Curatorship (*cura s. curatio*) is a charge imposed on one by the law or the government for the care of the person or the management of the affairs of another who, for a particular reason, is incapable, or is regarded as incapable, to care for himself or to manage his estate.² He on whom such charge is imposed is termed curator. He is not capable of supplementing by his authority (*auctoritatem interponere*), and thereby is substantially distinguished from a tutor, although, in relation to the management of property by him and by the tutor of a minor, on the whole the same principles govern.³

II. DIVISION OF THE CURATORSHIP.

§ 634. With respect to the extent and capacity of the curatorship the distinction is—

1. Perfect and imperfect curatorship (*cura plena* and *minus plena*), according as they have had the full right of administration conferred on them or only custody of the property connected with the right to alienate things which cannot be preserved.⁴

2. Curatorship of the person or of the property (*cura personalis* and *cura bonorum s. realis*). The former relates to the welfare and personal necessities of the curatee; the latter, on the contrary, relates only to the management of the property. Besides these there is still a mixed curatorship, in which both of the preceding functions are united.⁵

3. Curatorship general and special. The former relates to the entire estate, the latter to only a particular transaction of the curatee (*curator ad hoc*), e. g., *ad litem, ad dotem constituendam ad alimenta præstanda*.⁶

quently it was an *extraordinaria cognitio*: fr. 1. § 11. D. 48. 16; inscr. fr. 6. 7. D. 26. 10. By a *senatusconsultum* the deposed did not cease to be tutor till another was appointed in his stead: Gaius, I. § 182. See, generally, Inst. 1. 26; Dig. 26. 10; Cod. 5. 43; *Donellus*, Comm. jur. civ. Lib. 3, cap. 10, 16; *D'Hauw*, Diss. de suspectis tutoribus et curatoribus, Brug. 1825; *Glück*, Comm. Vol. 31, p. 41, seq.; *Rudorff*, Vol. 3, § 193-200.

¹ *Rudorff*, Vol. 1, § 9. See also the writings cited in § 614, *supra*.

² In that they are appointed by the law or the government, distinguishes them from the ordinary *procuratio*, which is based on the express authority of him who permits his business or his property to be managed by another.

³ Hence it is said in fr. 13. pr. D. 27. 1, "In a few points curators differ greatly from tutors."

⁴ fr. 48. D. 26. 7; fr. 1. § 17-24. D. 37. 9.

⁵ fr. 7. pr. D. 27. 10.

⁶ § 2. I. 1. 23; Const. 3. C. 5. 44; Const. 28. C. 5. 12; fr. 6. D. 27. 2; *Rudorff*, Vol. 1, p. 74.

4. Curatorship voluntary and necessary, the former only at the request of the *curatee*, but the latter is appointed against or without his consent. An example of the voluntary curatorship is the Roman curatorship of minors (§§ 640, 641, *infra*).

III. INCAPACITY AND EXCUSES OF CURATORS.

§ 635. The curator must be capable of undertaking the curatorship. If he be capable he is bound to undertake it, unless he can excuse himself. In both respects all that has been said of tutors (*supra*, § 616–622) applies to curators, excepting that the mother and grandmother are entitled only to the tutorship of their impubescent children and grandchildren, but not to the curatorship of their minor children and grandchildren,¹ and that the husband or bridegroom cannot be the curator of his wife or bride,² and a former tutor of a pupil, after the termination of the tutorship, need not be the curator of the same against his will.³

IV. DEVOLUTION OF THE CURATORSHIP.

§ 636. Those kinds of curatorships which were already embraced in the twelve tables were by them directly conferred by law (§§ 638, 639, *infra*); all others of later origin were always appointed by the magistrates (*curs dativæ*) (§ 640, *seq.*, *infra*), also those which originally appeared only as *legitimæ* at a later period were conferred by magisterial appointment in *subsidium*; even the devolution of law was changed into a magisterial devolution with especial regard to the next of kin. In the kinds of curatorship in which the magistrates must observe this regard,⁴ the modern law imposes on them the special observance of the father's or mother's wish expressed in his or her last testament (§§ 638, 639, *infra*). Such magistrates as may nominate tutors may also appoint curators.⁵

V. CASES OF CURATORSHIP.

A. CURATORSHIP OF IDIOTS AND LUNATICS.

§ 637. Maniacs, lunatics and other demented persons who are not subject to paternal power or tutorship must have curators.⁶ The curatorship of the mad (*cura furiosi*), but only this, was, by the ancient law, a legitimate curatorship,

¹ Novel 94. seems to contradict this, but it does not.

² fr. 14. D. 27. 10; Const. 2. C. 5. 34; fr. 1. § 5. D. 27. 1; *Rudorff*, Vol. 2, § 72.

³ § 18. I. 1. 25.

⁴ Such regard must also be had in the curatorship of minors: fr. 1. § 3. fr. 2. § 1. D. 26. 3; fr. 16. pr. § 1. D. 27. 10. At present this is conferred like tutorship.

⁵ § 1. I. 1. 23. See Const. 7. § 5. C. 5. 70.

⁶ fr. 3. pr. § 1. D. 26. 1; Dig. 27. 10; Cod. 5. 70; *Glück*, Comm. Vol. 33, § 1390–398; *Rudorff*, Vol. 1, § 16.

i. e., a right of the nearest agnates and of the *gens* of the demented to such curatorship.¹ On the other hand, by the modern law it has been extended to other weak or feeble-minded persons who cannot manage their estate themselves (*mente capti, fatui dementes*); but at present it is always a dative (appointed) curatorship,² but with the restriction that the magistrate shall not without special cause supersede the demented father's appointment of a curator by testament, nor, in default of such an appointment, pass over the next of kin of the demented.³ The curator named has not only to care for the management of the estate, but also for the restoration of the demented's health.⁴ If the demented have lucid intervals, then during such the curatorship is suspended, and, on the cessation of *dementia*, is wholly abrogated.⁵

B. CURATORSHIP OF SQUANDERERS.

§ 638. In relation to the management of property the squanderer (*prodigus*) is assimilated to the demented. Those only are so considered legally who, after a previous investigation, have been prohibited to manage their own property (*cui bonis interdictum est*).⁶ By the ancient law this could occur only to him who inherited *ab intestato* from his father or paternal grandfather, and thereupon, by the twelve tables, the management of his estate vested in his agnates and *gentiles*. By the modern law this could happen without such a condition precedent, and then the magistrate named the curator,⁷ like the case where the law calls (*i. e.*, generally according to the modern law) the next of kin to this office who is not fully qualified for it. In the course of time the same rules came to govern the devolution of this curatorship as those that govern the curatorship of madmen.⁸ The squanderer has control of his person, but not of his estate, excepting with his curator's consent, unless the transaction justifies it.⁹ The curatorship of the squanderer is not abrogated till the magistrate removes the prohibition and allows him again the administration of his estate.¹⁰

¹ Cicero, De invent. 2. 50. "ad agnatos gentilesque deducendus est;" Varro, De re rust. 1. 2; Ulpian, XII. § 2.

² §§ 3. 4. I. 1. 23; fr. 1. pr. D. 27. 10; Const. 1. C. 5. 70; fr. 1. § 11. fr. 2. D. 3. 1.

³ fr. 16. D. 27. 10; Const. 7. §§ 5. 6. C. 5. 70; Const. 27. C. 1. 4; fr. 2. 4. D. 27. 10.

⁴ fr. 7. pr. D. 27. 10.

⁵ fr. 1. pr. D. 27. 10; Const. 6. C. 5. 70; Const. 5. C. 6. 36.

⁶ Ulpian, XII. § 2; Rudorff, Vol. 1, § 17; Hoppe, Von den jurist. Verschwendern, Gieszen, 1803; Wicherlink, De cura prodigorum, Leyden, 1821.

⁷ Ulpian, XII. § 3.

⁸ § 3. I. 1. 23; fr. 1. pr. § 1. fr. 13. D. 27. 10; Dirksen, Über die Zwölf Tafeln, p. 379. seq. If a father declare in his testament that his adult son is a squanderer, and name a curator for him, the magistrate must confirm such curator: fr. 16. § 1-3. D. 27. 10.

⁹ fr. 10. pr. D. 27. 10; Const. 3. C. 2. 22; fr. 26. D. 18. 1; fr. 6. D. 45. 1; fr. 9. § 7. D. 12. 1; fr. 5. § 1. D. 29. 2.

¹⁰ Voet, Comm. ad Pand. lib. 27, tit. 10, § 7; Rudorff, Vol. 3, § 303, No. 6.

C. CURATORSHIP OF PUPILS.

§ 639. Pupils generally do not require curators, because they have tutors who at the same time manage their estate.¹ Yet this rule has the following exceptions:

1. When the pupil must conclude a lawful transaction with his tutor, or a suit is to be conducted between them,² or claims arise between them.³
2. When certain property at a distance requires special management.⁴
3. When the tutor because of temporary obstruction cannot immediately enter into his office, or if he be suspended from it,⁵ or if he temporarily relinquish it because of absence on state affairs.⁶
4. When he feigns an excuse, or is sued as a suspected (of wrong in his administration).⁷

In all of these cases a curator is named for the pupil; and only in lawful transactions in which it is necessary that he should undertake himself, if his ordinary tutor be temporarily hindered, he receives a special tutor for the requisite representation of his person, who in such case is appointed as an exception to the rule *ad certam causam*, for example, the entering into an inheritance given by a testament in which a tutor is appointed for the pupil.⁸ The curatorship of the pupil ceases as soon as its cause ceases.⁹

D. CURATORSHIP OF MINORS.

1. Cases in which it Arises.¹⁰

§ 640. He who is *sui juris* and pubescent, even if he be yet a minor, may validly undertake alone all lawful transactions for himself; he has the man-

¹ § 5. I. 1. 23; fr. 11. D. 26. 5; *Rudorff*, Vol. 1, § 12.

² § 3. I. 1. 21. See *supra*, § 629, note 3, p. 475.

³ Novel 72. c. 2.

⁴ fr. 21. § 2. D. 27. 1.

⁵ fr. 10. § 7. 8. fr. 12. D. 27. 1.

⁶ fr. 15. D. 26. 5.

⁷ fr. 17. § 1. D. 49. 1; § 7. I. 1. 26.

⁸ fr. 17. § 1. D. 49. 1; fr. 19. D. 26. 8; fr. 9. 13. pr. D. 26. 5.

⁹ *E. g.*, § 3. I. 1. 21; fr. 10. § 8. D. 27. 1.

¹⁰ A distinction between *maiores* and *minores XXV. annis* was first introduced by the *lex Plætoria* of the sixth century of the state. It threatens with public punishment those who defraud a minor, protects the minor against the injurious consequences of fraud, and in certain cases permits him to petition the magistrate for a curator. Perhaps this was a special curator for a single transaction; perhaps both of the first two prescripts should be exclusively or primarily applied to the transactions of the minor unassisted by the curator. Subsequently the rules of the *lex Plætoria* became disused in consequence of the more searching new ordinances, which relate mostly to minors only. The prætor introduced against fraud the action and exception of fraud (§ 227, *supra*), without distinction as to the age of the defrauded, and the minor was protected by the prætorian restoration to former condition (*in integrum restitutio*) against injurious lawful transactions, etc.,

agement of his own estate, of which he cannot be deprived, nor can it be entrusted to a curator, because of his youth.¹ Only in some important lawful transactions, as an exception, a curator must be appointed for the minor for the protection of his interests. These transactions are—

1. When the minor is in litigation.²
2. When he is to receive payment of a debt from his debtor.³
3. When his former tutor should render an account of his administration.⁴

Excepting these cases the minor receives a curator only for the management of his estate when he himself petitions the magistrate for one,⁵ whom he must retain till he has attained his majority.⁶

2. Effect of the Curatorship of Minors.

§ 641. When the minor has received, at his solicitation, a permanent curator for the management of his estate, he may, notwithstanding, bind himself and his estate without the curator's consent by conventions and other lawful acts.⁷ Such transactions are not *ipso jure* invalid because of the lack of the curator's consent; but if the minor is thereby injured, he may, to be restored (*in integrum*), have his age investigated, even if his curator should have consented.⁸ When he has sold, pledged or hypothecated his things,⁹ or desires to undertake a transaction for which, by a legal prescript, every minor must have a curator (§ 640, *supra*), then the curator's consent is req-

even if they were not fraudulent (§ 228, *seq.*). Pubescent minors who are *sui juris* may, by an ordinance of Marcus Aurelius, petition even for general curators without special cause, Capitulinus in vita Marci c. 10; so that the Romans already under the later heathen and Christian emperors permitted pubescent minors who were *sui juris* to have regular curators appointed for them, to which, however, there are many exceptions. For the history of this matter, see *Huber*, Digressiones, Lib. 3, c. 17; *Van Balen*, De lege Lætoris, etc., Groningen, 1828; *Glück*, Comm. Vol. 29, p. 473, Vol. 30, p. 3, *seq.*; *Rudorff*, Vol. 1, §§ 13, 14, 56; *Savigny*, Verm. Schriften, Vol. 2, No. 18.

¹ § 2. I. 1. 23; fr. 13. § 2. D. 26. 5.

² § 2. I. 1. 23; Const. 1. C. 5. 31; Const. 11. C. 5. 34.

³ fr. 7. § 2. fr. 27. §§ 1. 2. fr. 32. D. 4. 4.

⁴ Const. 7. C. 5. 31. See fr. 5. § 5. D. 26. 7.

⁵ pr. I. 1. 23. comp. with § 2. I. 1. 23; fr. 13. § 2. D. 26. 5; fr. 2. §§ 4. 5. D. 26. 6; fr. 43. § 3. D. 3. 2; Const. 6. C. 5. 31.

⁶ fr. 1. § 3. D. 4. 4; *Glück*, Vol. 30, p. 52, *seq.*; *Rudorff*, Vol. 1, § 15, Vol. 2, § 123, p. 291; *Savigny*, Verm. Schriften, Vol. 2, p. 392, *seq.*

⁷ fr. 101. D. 45. 1; fr. 20. § 1. D. 34. 3. comp. with fr. 43. D. 44. 7; fr. 16. pr. D. 4. 4; fr. 3. § 2. D. 14. 6; fr. 2. § 1. D. 50. 12; Const. 13. C. 6. 30; *Rudorff*, Vol. 2, p. 284, *seq.*; *Savigny*, Verm. Schriften, Vol. 2, p. 384, *seq.*

⁸ fr. 1. fr. 29. pr. fr. 47. D. 4. 4; Const. 3. 4. 5. C. 2. 22; Cod. 2. 25. See, more particularly, *supra*, §§ 228, 280.

⁹ Const. 3. C. 2. 22. In the alienation of the minor's immovables and things regarded as such the curator is bound by the same legal rules as the tutor in the alienation of the pupil's property. See *infra*, § 646.

uisite for its validity. By the lack of such consent, for the minor's advantage such transaction is *ipso jure* invalid, so that no restitution is required; but if the curator consented, then, by strict law, the minor is bound; however, if he be injured, he may petition to be restored *in integrum*.¹

3. End of the Curatorship of Minors.

§ 642. The curatorship of minors ceases—

1. When the minor or curator dies.²
2. When either of them suffers a great or medium loss of status (*maxima* or *media capitis deminutio*).³
3. When the minor attains his majority or has a dispensation as to age (*venia ætatis*).⁴
4. When the curator is released by an excuse.
5. When he is removed because he is suspected (of wrong in the curatorship);⁵ or
6. When the curator was appointed only for a time, or on condition, or for a certain matter, and the time has expired, or the condition has been performed, or the transaction completed.⁶

E. CURATORSHIP OF INVALIDS.

§ 643. Invalids, *i. e.*, such as suffer from chronic infirmities or prolonged sickness, and are therefore unable to manage their estate, may have a curator, though in general only when they desire it, and only so long as it is necessary.⁷

F. OTHER MANAGEMENT OF PROPERTY.

§ 644. The Roman law treats also of the following management of property:

1. The curatorship of a bankrupt's estate.⁸
2. The *cura ventris et bonorum* which is ordered when a wife is pregnant at her husband's death, to care for her personal necessities and manage the estate which will belong to the child in embryo.⁹
3. The curatorship of property *ex edicto Carboniano*, which is ordered when some one contests the right of inheritance of the alleged impubescent

¹ fr. 7. § 2. fr. 32. D. 4. 4; Const. 11. C. 5. 34; Const. 2. C. 2. 25.

² arg. § 3. I. 1. 22.

³ arg. §§ 1. 4. I. 1. 22.

⁴ pr. I. 1. 23; Const. 2. C. 245. See *supra*, § 138, note 6.

⁵ arg. § 6. I. 1. 22.

⁶ arg. §§ 2. 5. I. 1. 22; § 3. I. 1. 21; fr. 10. § 8. D. 27. 1.

⁷ § 4. I. 1. 23; fr. 2. D. 27. 10; *Rudorff*, Vol. 1, § 18.

⁸ fr. 2. pr. D. 42. 7. See *supra*, §§ 524, 525; *Rudorff*, Vol. 1, § 21.

⁹ fr. 1. § 17-24. D. 37. 9; fr. 20. pr. D. 26. 5; fr. 8. D. 27. 10; fr. 48. D. 26. 7; *Rudorff*, Vol. 1, § 10.

child of the estate leaver, averring that it is not the estate leaver's child; the child in this case is given the *bonorum possessio Carboniana*, and the suit is suspended till it has become pubescent. If neither the child nor his antagonist give the necessary security for suit, then the management of the litigated inheritance or inheritance portion is temporarily committed to a curator to be nominated.¹

4. The *cura hereditatis jacentis*, or the management of an inheritance respecting whose acceptance or rejection the heirs have not yet determined.²

5. The *cura bonorum absentis*, or the management of an absentee's estate, if he left no authorized person to manage it.³

CHAPTER III.

OF THE MANAGEMENT OF PROPERTY BY THE TUTOR AND CURATOR.

I. DUTIES OF THE TUTOR AND CURATOR ON ENTERING ON THE MANAGEMENT.

§ 645. The tutor and curator of an impubescent have the right and duty to manage the property committed to his care.⁴ Every tutor or curator, even the mother if she undertake the guardianship of her children, is bound, immediately on entering the tutorship or curatorship, to make an inventory of the property to be managed, excepting if he from whom the ward inherited the property, be it the father or another, expressly forbade the inventory. But the ward's father may prohibit it only if he left the ward something.⁵ If the tutor or curator omit the taking of an inventory, he is liable for all damages, and may be removed as a suspected.⁶

II. DURING THE MANAGEMENT.

§ 646. In the management of the ward's estate, the tutor and curator have to care—

1. For the keeping, increase and best use of the same.⁷ In this regard he

¹ Dig. 37. 10; *Rudorff*, Vol. 1, § 11.

² fr. 3. D. 27. 10; fr. 1. § 4. in fin. D. 50. 4; fr. 22. § 1. D. 42. 5; *Rudorff*, Vol. 1, § 22.

³ fr. 1. § 4. D. 50. 4; fr. 22. § 1. D. 42. 5; fr. 15. pr. D. 4. 6; Const. 3. C. 8. 51; *Rudorff*, Vol. 1, §§ 19, 20; *Glück*, Comm. Vol. 33, p. 259, *seq.*

⁴ Dig. 26. 7; Cod. 5. tit. 37. 38. 55; *Donellus*, Comm. jur. civ. Lib. 15, c. 18-22; *Glück*, Comm. Vol. 30, § 1328-1336; *Rudorff*, Vol. 2, § 132, *seq.*

⁵ Const. ult. § 1. C. 5. 51. comp. with Const. 22. C. 5. 37; Novel 117. c. 1.

⁶ fr. 1. § 1. fr. 7. pr. D. 26. 7; Const. 24. C. 5. 37.

⁷ fr. 3. pr. fr. 7. § 3. fr. 13. § 1. fr. 15. fr. 32. §§ 1. 2. fr. 46. § 7. D. 26. 7; Const. 22. 24. C. 5. 37; Cod. 5. 56; Novel 72. c. 6-8. On the obligation of guardians to lend their ward's capital at interest, see *Glück*, Comm. Vol. 30, p. 316. The

is bound to apply the same care to such property as he gives to his own; he is bound for all damages which arise from the omission of such care,¹ but not also for the neglect of his predecessor, nor for casual damages.²

2. He must defray all the necessary expenses out of the ward's estate, in which are specially included the expenses of rearing and debts.³ He cannot make gifts, excepting the ward's station requires it or to assist necessitous brothers and sisters of the ward.⁴

3. In relation to the alienation of the ward's estate,⁵ he is bound by the following prescripts: He may alienate not only perishable things, but he is bound so to do; otherwise he must reimburse the damages arising therefrom.⁶ On the contrary, immovables and such movables as may be preserved, he may generally alienate or pledge only when absolutely necessary to pay pressing claims,⁷ and after the magistrate, by a previous investigation of the circumstances, has consented to it by a decree,⁸ excepting in the following cases: when the pupil's father by his testament, or the regent by rescript, permitted the alienation of a thing;⁹ when a third person is authorized to require this;¹⁰ when the guardian pawns property of the pupil which had been pawned to him, who advanced money to satisfy the previous pawn creditor, provided that the new pledge is not made under more disadvantageous conditions than the former was made;¹¹ when he sells the pupil's pawned property;¹² when he pays or lends money, or applies it for the procurement of guardian may charge himself with the pupil's money as a loan to himself at interest: fr. 9. § 7. D. 26. 7.

¹ fr. 1. pr. D. 27. 3. See fr. 10. fr. 33. pr. D. 26. 7; Const. 7. C. 5. 51. On the case when several guardians have managed the property, see fr. 3. fr. 4. fr. 55. pr. D. 26. 7; Const. 2. C. 5. 52.

² Const. 4. C. 5. 38. However, see fr. 37. § 1. D. 3. 5; fr. 35. D. 12. 1; fr. 4. D. 27. 8.

³ fr. 9. § 5. fr. 13. § 2. D. 26. 7; Const. 1. 2. C. 5. 50.

⁴ fr. 22. fr. 46. § 7. fr. 12. § 3. D. 26. 7; fr. 12. § 3. fr. 13. § 2. D. 26. 7; fr. 1. §§ 4. 5. D. 27. 3.

⁵ A senatusconsultum of Septimus Severus and Antoninus Caracalla in the year 195, resulting from an oration of the former, first prohibited in Rome the alienation of the *prædia rustica* and *suburbana* of impubescents and minors in the manner presented in the text. This prohibition was then by interpretation extended to the whole empire, to other objects of curatorships, and to rights in land (*jura prædiorum*) which were alienated or constituted, and by an ordinance of Constantine was extended to other things. Justinian added thereto several better-defined rules. See Dig. 27. 9; Cod. 5. tit. 71-74; Cod. Theod. 3. 21; Glück, Comm. Vol. 32, § 1381; Vol. 33, § 1382-1389; Rudorff, Vol. 2, § 139, seq.

⁶ Const. 22. in fin. C. 5. 37. See Const. 28. § 5. C. 5. 37; Const. 4. C. 5. 72; fr. 7. § 1. D. 26. 7.

⁷ fr. 5. § 14. D. 27. 9; Const. 12. C. 5. 71.

⁸ Const. 22. C. 5. 37; Const. 13. C. 5. 71.

⁹ fr. 1. §§ 2. 3. fr. 14. D. 27. 9; Const. 2. 3. C. 5. 72.

¹⁰ fr. 1. § 2. fr. 5. § 6. D. 27. 9; Const. 2. 15. 17. C. 5. 71; Const. 1. C. 5. 72.

¹¹ fr. 7. §§ 5. 6. D. 27. 9.

¹² fr. 5. § 3. D. 27. 9.

things,¹ and when he must give juridical security for the pupil.² Excepting these cases, every alienation without the sanction of a judicial decree is voidable,³ and may be contested by the ward, who must show its informality,⁴ but he must not pay the guardian's alienee more than is proven to have been expended for his advantage.⁵ The voidability arising from the lack of a judicial decree ceases if the minor approve the alienation after the attainment of his majority, or, in the event that such alienation was onerous, he do not contest it within five years after the attainment of his majority. Neither the minor nor his curator can make donations, even with a judicial decree; therefore the donee, in order to have an irrevocable property therein, requires the usual prescription, but which commences only from the time that the minor attains his majority.⁶

III. AFTER THE END OF THE MANAGEMENT.

§ 647. After the tutorship or curatorship has ended, the tutor and curator are bound to give an account of their administration.⁷ Neither the ward's father nor the regent may release them from this duty, but he who was ward may.⁸ If the account be stated to the ward during his minority, then a curator is appointed to assist him in the account.⁹ The inventory forms the basis of the account, and the receipts and expenditures are to be precisely specified, and every important item must be supported by vouchers. After the account has been closed, the tutor or curator must transfer the remaining estate with interest from the day of closing. The pupil, the minor and the demented, but not also the prodigal, sick and absentee, have a lien on the guardian's entire estate as security for the faithful administration of the tutorship or curatorship, for the transfer of the property, and for the payment of damages by the tutor or curator.¹⁰ The guardian is forbidden, subject to the penalty for fraud, to enter into any kind of contract with the fiscus before he has rendered an account.¹¹

¹ Const. 23. 24. C. 5. 37.

² Const. ult. § 3. C. 5. 37.

³ Const. 14. 15. 16. C. 5. 37; fr. 5. § 15. D. 27. 9; Cod. 5. 73.

⁴ fr. 1. § 2. fr. 5. § 15. D. 27. 9; Const. 2. C. 5. 73; arg. fr. 5. § 1. D. 22. 3. The text is not contradicted by fr. 13. § 2. D. 6. 2.

⁵ Const. 10. 16. C. 5. 71; Const. 16. C. 5. 37; fr. 10. D. 27. 9.

⁶ Const. 2. 3. C. 5. 74. The Const. 3. cit. is variously interpreted: *Unterholzner*, *Verjährungslehre*, Vol. 2, p. 43; *Rudorff*, Vol. 2, p. 443, *seq.*

⁷ Dig. 27. 3. By the Roman law the tutor and curator are not required to render an account till the end of the tutor or curatorship: fr. 4. pr. D. 27. 3; Const. 14. C. 5. 37.

⁸ fr. 9. fr. 20. § 1. fr. 28. § 4. fr. 31. § 2. D. 34. 3.

⁹ § 2. I. 1. 23; fr. 9. § 4. D. 27. 3. See *supra*, § 640.

¹⁰ Const. 29. C. 5. 37; Const. un. § 1. C. 5. 13; Const. 7. § 5. C. 5. 70; Novel 118. c. 5. in fin. See note 6, p. 273, *supra*, and note 9, p. 395, *supra*.

¹¹ fr. 1. § 9-12. D. 48. 10; fr. 49. D. 19. 2; Const. un. C. 5. 41.

IV. ACTIONS ARISING FROM THE ADMINISTRATION OF THE TUTORSHIP AND CURATORSHIP.

§ 648. From the administration of the tutorship there arises between the pupil and tutor—

1. An obligation *quasi ex contractu* (§ 491, *supra*). The pupil has for this cause the *directa tutelæ* action, in which he can sue the tutor for the performance of his duties, especially in relation to the administration of the estate; against which the tutor has the *contraria tutelæ* action for indemnity for what he expended of his own means for the pupil's benefit.¹ In the curatorship a similar action for both parties exists, which is termed *utilis curationis causa* action. It is evidently the *directa* and *contraria negotiorum gestorum* action, but with the peculiarity that the rules of the *tutelæ* action are analogously applied thereto.² Against a protutor the pupil has the *directa*, and the former against the latter has the *contraria protutelæ* action.³

2. The tutor or curator who has fraudulently appropriated the ward's property may be sued in the action *de rationibus distrahendis* for a double reimbursement of the amount so appropriated.⁴

¹ § 2. I. 3. 27. (28); Dig. 27. tit. 3. and 4; Cod. 5. tit. 51–54; Glück, Comm. Vol. 32, p. 174, *seq.*

² fr. 1. § 2. D. 27. 4; fr. 16. § 1. D. 27. 3; Const. 3. C. 5. 51; Rudorff, Vol. 3, § 154.

³ Dig. 27. 5. The protutor has in the administration of the property generally the same rights and duties as the true tutor. He is bound like the latter for fraud (*dolus, culpa*) and such care as he gives to his own affairs (*diligentia quam in suis rebus*), provided that he acted as a tutor, otherwise he is only regarded as a business agent (*negotiorum gestor*), and as such is bound absolutely for *diligentia*: fr. 1. §§ 1. 6. fr. 4. D. 27. 5; Rudorff, Vol. 3, § 157.

⁴ As early as the twelve tables: fr. 1. § 19–24. fr. 2. D. 27. 3; Paul, II. 30.

FOURTH BOOK.

LAW OF INHERITANCE.

ON THE ENTIRE LAW OF INHERITANCE.—*Donellus*, Comm. jur. civ. Lib. VI., VII., VIII., IX. cap. 1-4; *Madiñ*, Principia juris Romani de successionibus seu de jure hereditario, Frankfort-on-the-Oder, 1792; *Dalwigk*, Versuch einer philos-jurist. Darstellung des Erbrechts, 1st and 2d Parts, Wiesbaden, 1820; 3d Part, Ib. 1822; *Ed. Gans*, Das Römische Erbrecht, Vol. 1, Berlin, 1824; Vol. 2, Berlin, 1825; Vols. 3, 4, Stuttgart and Tübingen, 1829, 1835; *Hartitzsch*, Das Erbrecht nach römischen und heutigen Rechten, Leipzig, 1827; *Hunger*, Das Röm. Erbrecht, Erlangen, 1834; *Mayer*, Die Lehre von dem Erbrecht, Berlin, 1840; *Vangerow*, Leitfaden für Pand., Vol. 2, Marb. and Leipzig, 1842; *Sintenis*, Das gemeine prakt. Civilr. § 158, *seq.*, Vol. 3, p. 312, *seq.*; *Beckhaus*, Grundzüge des Röm. Erbrechts, Jena, 1860; *Schirmer*, Handbuch des Röm. Erbrechts, Vol. 1, Leipsic, 1863.

SECTION FIRST.

GENERAL PRELIMINARY NOTION.¹

I. SUCCESSION IN GENERAL.

§ 649. Succession is the entry into the place and rights of another. In relation to property it is either succession to the living (*inter vivos*) or to the dead (*mortis causa*), according as one enters into the rights of property of a living or a deceased person. The one or the other is again either succession to the entire estate, universal succession, *successio per universitatem* (*successio universalis*), or succession to things in severalty, *in singulam rem* (*successio singularis*), according as the succession relates to the entire property of the predecessor, as a juridical entirety, i. e., into all his active as well as passive legal relations, or only into a single active legal relation.² Here the only succession treated on will be *mortis causa*.³

II. INHERITANCE AND INHERITANCE SUCCESSION.

§ 650. On the death of a person his status and family rights are extinguished, but not his rights of property, for these generally vest in others.

1. The decedent's estate, viewed as a juridical entirety, is termed his inheritance, *hereditas* in an objective sense, or *patrimonium defuncti*, *bona defuncti*,

¹ *Rosshirt*, Einleitung in das Erbrecht, Landshut, 1831, § 1-10.

² See § 191, *supra*. Examples of a *successio per universitatem inter viros* see in *Gaius*, III. § 78-84; *Inst.* 3. tit. 10. (11)-12. 13; on universal and several succession generally, *Rosshirt*, § 3; *Savigny*, Syst. Vol. 3, § 165.

³ But we do not limit ourselves to strict succession to the legal relations of a deceased. See end of § 656, *infra*.

universum jus defuncti,¹ or also *familia*.² The inheritance includes not only the rights to things and claims which the deceased had, but also his debts.³ From these are excepted, however, the strictly personal rights and debts of the deceased, which are extinguished by his death.⁴

2. The right of a survivor to the decedent's estate is termed *right of inheritance*, he to whom it belongs is termed *heir*, and the actual entry into the legal relations of the deceased, *inheritance succession*, *successio in universum jus defuncti*. In Latin the heir is termed *heres*, and the right of inheritance, as also the inheritance succession, is termed *hereditas* in the subjective sense.⁵ However, these terms are only used by the Romans without further addition where the heir, according to strict law, becomes the actual universal successor of the decedent, not also where only *utiles* actions and exceptions are given, by means of which he is treated as a universal successor (*heredis loco est*).⁶ The idea of inheritance and right of inheritance presumes that some one is deceased (*hereditas viventis non datur*).⁷

III. HEIR OR UNIVERSAL SUCCESSOR IN THE EVENT OF DEATH. ESPECIALLY *heres* IN THE PROPER SENSE AND *fideicommissarius heres*.

§ 651. Heir is he who actively or passively succeeds to the entire⁴ property of the estate leaver. He is not only the successor to the rights and claims, but also to the estate leaver's debts,⁵ and in relation to his estate is to be regarded as the identical person of the estate leaver, inasmuch as he represents him in all his active and passive relations to his estate.⁶ It matters not whether there be but one heir or several; in the latter event each of the several heirs succeeds to the entirety of the estate, hence into all the active and passive legal relations of the estate leaver, though each succeeds only to the part to which he has been called as heir (*pro rata*) (§ 749, *infra*). If there be but one heir he is termed *heres ex asse* (one heir) or *heres solus* (heir alone); if, on the contrary, several heirs have been called to the inheritance, then each in relation to the inheritance is termed *heres ex parte*, and in rela-

¹ Cicero, *Top.* c. 6. § 29; § 20. I. 4. 6; fr. 2. pr. D. 10. 2; fr. 5. pr. D. 5. 3.

² *E. g.*, tit. D. et C. *Familie* eriscundæ; Lex XII. tabb.; Ulpian, 26. 1. On the relation of this term to that of *hereditas* in the objective sense, see Schirmer, *Erbrecht*, § 1, note 5.

³ fr. 3. pr. § 1. D. 37. 1; fr. 119. 208. D. 50. 16; fr. 50. pr. D. 5. 3; Glück, *Von der Intestaterbfolge*, § 1.

⁴ fr. 1. § 43. D. 43. 20; Const. 14. C. 3. 33; Roszhirt, § 2; Schirmer, p. 11, *seq.*

⁵ fr. 62. D. 50. 17; fr. 24. D. 50. 16. The word *successio* is often used for inheritance in its objective sense: *e. g.*, fr. 19. D. 5. 2; Const. 10. C. 3. 36; Const. 2. C. 6. 15; Const. 3. C. 6. 58; Const. 9. C. 6. 59.

⁶ See the end of § 651 and § 657, *infra*.

⁷ fr. 1. D. 18. 4; fr. 19. D. 29. 2; Glück, *supra*, § 2.

⁸ So far as the former and latter are not extinguished by death, note 4, *supra*.

⁹ fr. 37. D. 29. 2; fr. 24. 208. D. 50. 16; fr. 11. D. 44. 3. See also fr. 34. D. 41. 1; fr. 31. § 1. D. 28. 5; fr. 13. § 5. D. 43. 24; fr. 1. pr. D. 1. 8.

tion to his co-heirs, *coheres*. The true *heres* after the estate leaver's death enters immediately into his place, and is therefore termed by the moderns *heres directus*. But by the modern Roman law he is regarded as an heir (*heredis loco est*) to whom the inheritance, according to the estate leaver's testament, is wholly or partly immediately transferred through the *heres directus*, who in this respect is termed *heres fiduciarius*, and the former is termed *fideicommissarius heres*.¹

IV. SUCCESSOR IN SEVERALTY.

§ 652. The successor in severalty, in the event of death, differs from the heirs; by such successor is generally understood every one who succeeds only to the several active rights of an estate leaver, it being immaterial whether it is to only one or to several, or to all.² A union of the person of the successor with the estate leaver, as in the case of heirs, does not occur. Hence the severalty successor is not bound for the estate leaver's debts, not even if a thing pledged for the estate leaver's debt be bequeathed to him. Though in such case he must bear the burden of the pledge as the onus of the thing, and may be sued like every possessor of a pledged thing in the action *hypothecaria*,³ he does not therefore, like the heir, become in his person the creditor's debtor. Several succession in the event of death is treated on in § 656, *infra*.

V. DESCENT AND ACQUISITION OF THE INHERITANCE.

§ 653. In inheritance (*hereditas*) descent must be distinguished from acquisition.

1. The inheritance descends (*hereditas delata est*) if it for any cause be offered to one so that it can be acquired only by that one.⁴

2. The inheritance is acquired (*hereditas acquisita est*) when the one to whom it is offered actually acquires it, and thereby actually becomes heir; the acquisition of an inheritance therefore always presumes a descent, and that the heir survives the estate leaver.⁵

VI. PRINCIPLES OF DEVOLUTION.

A. IN GENERAL.

§ 654. The devolution of an inheritance by the Roman law is based either on a testament of the estate leaver or, in default of it, on the law. According to which there are two kinds of inheritance succession, the testamentary (*tes-*

¹ § 2. I. 2. 23. See *infra*, §§ 781, 785-788.

² Therefore by the gift of all of the estate, *inter vivos* as well as *mortis causa*, only a several succession is founded. See § 465, *supra*.

³ Const. 2. 7. C. 4. 16; fr. 16. § 3. fr. 17. D. 20. 1. See also fr. 34. § 2. D. 32.

⁴ fr. 151. D. 50. 16.

⁵ fr. 19. D. 29. 2. Of the succession to the property of a person who has disappeared, see § 153, note 9, *supra*.

tamentaria hereditas) and the legal or intestate succession (*legitima hereditas s. successio ab intestato*).¹ On the other hand, by the Roman law a right of inheritance of the universal succession to the estate leaver's property cannot be founded on convention with the estate leaver.²

B. RELATION OF TESTAMENTARY AND INTESTATE SUCCESSION TO EACH OTHER.

§ 655. The relation of these two kinds of inheritance succession to each other by the Roman law is as follows:

1. The testamentary inheritance succession has precedence of the intestate succession, and the latter does not take effect so long as the former may be expected.³

2. By the Roman law both are in general so incapable of being united that they cannot exist together in the same inheritance. To this the remarkable and important rule of the Roman law refers: "*Nemo pro parte testatus, pro parte intestatus decedere potest*" (no one can die testate as to part and intestate as to part),⁴ which, however, has no application to soldiers,⁵ and in the case of *pagani*⁶ it is subject to exceptions.⁷

VII. LEGACIES AND FIDEICOMMISSA.

§ 656. The estate leaver may not only appoint direct heirs by a unilateral testament, but he may also make other unilateral dispositions by testament, whereby on his death property may be given to other persons. The Romans term dispositions of the latter kind, according to circumstances, either *legata* (§ 760, *infra*) or *fideicommissa* (§ 781, *infra*). In relation to their subject-matter and consequences they may produce an indirect fideicommissarial inheritance succession (§ 652 in fin., *supra*) and also several succession to single rights of the deceased (§ 653, *supra*). But there are legacies and *fideicommissa* whereby one becomes neither the direct nor the indirect suc-

¹ § 6. in fin. I. 2. 9; fr. 39. D. 29. 2.

² Const. 30. C. 2. 3; Const. 5. C. 5. 14; Const. 4. C. 8. 39. See fr. 29. § 2. D. 39. 5; fr. 61. D. 45. 1; Const. 19. C. 2. 3; *Rosshirt*, Erbrecht, p. 27, *seq.*; *Hartmann*, Zur Lehre von den Erbevetr., Brunswick, 1860.

³ fr. 39. D. 29. 2; Const. 8. C. 6. 59.

⁴ fr. 7. D. 50. 17; § 5. I. 2. 14; Cicero, De invent. II. 21. On the consequence and effect of this rule, see fr. 1. D. 29. 2; fr. 1. § 4. fr. 9. § 13. fr. 74. D. 28. 5; fr. 41. § 8. in fin. D. 28. 6; § 9. I. 2. 14; fr. 34. D. 28. 5; Const. 20. C. 6. 30. For the reason thereof, see *Gans*, Erbrecht, Vol. 2, p. 451; *Zawitz*, De regula, secundum quam nemo pro parte, etc., Göttingen, 1837; *Glück*, Comm. Vol. 40, p. 142; *Wenzig*, De regula jur. Rom. nem. pro parte, etc., Berlin, 1853; *Schirmer*, Erbrecht, p. 52, *seq.*

⁵ fr. 6. D. 29. 1; § 5. I. 2. 14; fr. 15. § 4. fr. 17. pr. fr. 37. D. 29. 1; Const. 1. 2. C. 6. 21.

⁶ Civilians, not the military. See Const. 37. C. 3. 28.

⁷ Namely, in the partial rescission of an inofficious testament: fr. 15. § 2. fr. 24. D. 5. 2. See § 717, *infra*.

cessor of the estate leaver. Thus: the heir A. shall transfer his own house to B. Legacies and *fideicommissa* have some similarity to *mortis causa donationes* (§ 463, *supra*; § 793, *seq.*, *infra*).

VIII. BONORUM POSSESSIO.

A. NATURE.

§ 657. At the time of the development of the prætorian law the provisions of the twelve tables respecting inheritance were insufficient and a part of them no longer accorded with the prevailing views. The prætor relieved this want by means of the Institute *bonorum possessio*. This *bonorum possessio* was an official installation into the estate of a decedent as decedent, in consequence of a petition therefor (*bonorum possessionem petere s. agnoscere*) which the prætor granted.¹ We only know of the Institute when it was fully developed, i. e., from the time of the later classical jurists.² In it is found a perfect system of direct inheritance succession according to the prætorian law. We find in the prætorian edict not only many persons who are not called to the inheritance, but also all that are called to it are introduced as such as may attain the *bonorum possessio* if they desire. In it the order in which they are called is presented, and more precise directions are given how they who are first called but do not accept the *bonorum possessio* are succeeded by those who were behind them (*successorium edictum*).³ Every one who attained the *bonorum possessio*, i. e., who was called to it and actually accepted, could by an interdict for obtaining possession (*adipiscendæ possessionis*), the interdict *Quorum bonorum*,⁴ obtain the possession of the corporeal property of the inheritance without distinction, whether he had also been called to the inheritance and had acquired it or not.⁵ The other consequences of the *bonorum possessio* when acquired are treated in § 660, *infra*.⁶

¹ Gaius, III. § 25-38; Ulpian, tit. 28; Inst. 3. 9. (10); Dig. lib. 37. 38; Cod. VI. 11-13; *Donellus*, Comm. jur. civ. Lib. 7, cap. 14; *Heineccius*, Antiq. Rom. lib. 3, tit. 10; *Glück*, Von der Intestaterbfolge, 2d ed. § 86-107; *Schirmer*, p. 73, *seq.*; *Savigny*, Verm. Schriften, Vol. 2, No. 17, particularly p. 230, *seq.*; *Hingst*, Commentatio de bonor. possessione, Amsterdam, 1858; *Lohman Janssonius*, De bonor. possessione, Groningen, 1859; *Fabrizius*, Ursprung und Entwicklung der bonorum poss., Berlin, 1837.

² The views respecting the original character of the *bonorum possessio* are therefore extremely various. See the writings cited in note 1.

³ § 4-7. I. 3. 9. (10); Dig. 38. 15.

⁴ Gaius, III. § 34; IV. § 144; § 3. I. 4. 15; Dig. 43. 2; Cod. 8. 2. See § 748, *infra*, the first note.

⁵ Also without distinction, whether he acquired a *bonorum possessio cum* or *sine re* (§ 659, div. 3, *infra*).

⁶ If it be effective (§ 659, div. 3; § 661, div. 4, *infra*) and the *bonorum possessor* has not also acquired the inheritance, then he is in lieu of heir (*heredis loco*): Gaius, III. § 32; IV. § 34; § 2. I. 3. 9. (10). See fr. 2. D. 37. 1; fr. 138. D. 50. 16; fr. 117. D. 50. 17. But particularly *Savigny*, *supra*, p. 14.

B. VARIOUS KINDS OF THE BONORUM POSSESSIO.

§ 658. The term *bonorum possessio* in relation to a decedent's estate, in its general sense, comprehends two essentially different cases: one whereby under the name *bonorum possessio* an actual (but yet only prætorian) right of inheritance is conferred, which may be termed the *bonorum possessio* in its proper sense, and the other when one with an uncertain right of inheritance, by means of prætorian installation, obtained only the possession of the inheritance succession in the interim and a temporary support thereout.¹ The *bonorum possessio* in its proper sense only will now be treated, and this is—

1. Either *edictalis* or *decretalis*. It is termed *edictalis* when it is conferred on one in the language of the edict, who thereupon may immediately claim it without requiring a previous investigation (*causæ cognitio*) or a conferring decree. On the contrary, the *bonorum possessio* is termed *decretalis* when one has not been called thereto by the words of the edict, but yet who believes that according to the spirit of the edict he can claim it; but in which case an investigation and special decree of the prætor to confer it on him are always necessary.² At the time when the system of the prætorian inheritance succession was developed, the *bonorum possessio edictalis* was the rule; the *bonorum possessio decretalis* the exception.

2. The administration of the *bonorum possessio* is advantageous for him who at the same time is called to the inheritance, because when necessary he may employ the interdict *Quorum bonorum*; it is for him *utilis propter prætoriam actionem*.³ For those who were not called to the inheritance, but only called to the *bonorum possessio*, there is no other mode of obtaining the inheritance than by the administration of the *bonorum possessio*; therefore to become heir the *bonorum possessio* is necessary. This is the view of the modern writers when they divide the *bonorum possessio* into *utilis* and *necessaria*.

3. There is yet another division, into *bonorum possessio cum re s. cum effectu* and *bonorum possessio sine re s. sine effectu*. The former is that when the prætorian heir, who had claimed it, retains the inheritance; the latter is that when he may be deprived of it by a nearer heir.⁴

C. ORDER OF SUCCESSION TO THE BONORUM POSSESSIO.

§ 659. The *bonorum possessio* was generally conferred in the following order:⁵

¹ These provisional appointments are treated on at the end of § 736, and in § 748, *infra*.

² *E. g.*, fr. 6. D. 38. 6; fr. 4. D. 37. 8; fr. 1. § 7. D. 38. 9. The term *edictalis bonorum possessio* occurs in fr. 30. § 1. D. 29. 2; fr. 1. § 4. D. 38. 6; *Fabrizius, supra*, p. 145–197.

³ fr. 2. § 21. D. 38. 17; Const. 13. C. 6. 30; Coll. Leg. Mos. et Rom. tit. XVI. § 3.

⁴ *Gaius*, II. §§ 148. 149; III. § 35–37; *Ulpian*, 28. § 13.

⁵ *Ulpian*, 28. § 1; fr. 6. § 1. D. 37. 1.

1. Primarily came the *bonorum possessio contra tabulas* (contrary to the testament), which, in derogation of a paternal testament, was offered to the proper heir (*suis*), who was omitted by the testament, and to such emancipated bodily heir as was also omitted, and who, without emancipation, would have been the proper heir (*sui*); and next to them at the same time came the proper heir instituted by the testament and the testamentarily instituted emancipated bodily heir;¹ if there were neither omitted *sui* nor *emancipati* existing, or if the *bonorum possessio contra tabulas* were not administered by any one to whom it was offered, then

2. The *bonorum possessio secundum tabulas* (according to the testament) was conferred on the instituted heir. But both of these kinds of the *bonorum possessio* presume a testament which, at least by the prætorian law, was valid.² There are two kinds of the testamentary *bonorum possessio*. If no such testament existed, or if no testamentary *bonorum possessio* were administered, then there was

3. The *bonorum possessio intestati*, which was usually offered to four and sometimes to a larger number of classes of kin to the deceased.³ Each of the *bonorum possessio* administered in this order of the *edicti perpetui* was termed ordinary, every other that did not belong to a certain class was termed extraordinary, and in this latter were specially included most cases of the *bonorum possessio decretalis*.⁴

D. APPLICATION OF THE SYSTEM OF THE BONORUM POSSESSIO IN CONNECTION WITH THAT OF THE INHERITANCE IN INDIVIDUAL CASES.

§ 660. The prætorian edict called to the *bonorum possessio* all those who by the civil law were called to the inheritance, but some before, some at the same time, and particularly after these a number of others. If one were called only to the inheritance in an individual case, then naturally he could only acquire the inheritance; if one were called only to the *bonorum possessio*, then he could only acquire it; if he were called to the inheritance and to the *bonorum possessio*, then he could acquire both, and he could also acquire one without the other, and especially the inheritance without the *bonorum possessio*, so that the latter would devolve to another in the same manner as if he had not acquired the inheritance. Hence the following cases may arise:

1. When only the inheritance was acquired. In such case it is to be regarded as if the institute of the *bonorum possessio* did not exist.

2. When only the *bonorum possessio* was acquired. In such case, if it were *cum re*, the *bonorum possessor* by means of *utilis* actions will be regarded as an heir; he is *heredis loco* (in lieu of heir). He also has the interdict *Quorum bonorum*.

¹ § 3. 1. 3. 9. (10); Dig. 37. 4-7; Cod. 6. 12.

² § 3. 1. 3. 9. (10); Dig. 37. 11; Cod. 6. 11.

³ § 3. 1. 3. 9. (10); Inst. 3. tit. 5. 6; Dig. 38. tit. 6-12; Cod. 6. tit. 14. 15. 18.

⁴ fr. 5. § 3. D. 37. 5; fr. 3. § 14-16. D. 37. 10.

3. When the inheritance and the *bonorum possessio* were acquired by the same person. Then all the consequences of the inheritance follow, and thereupon the interdict *Quorum bonorum* is allowed.

4. When the inheritance was acquired by one and the *bonorum possessio* by another.¹ In such case the latter always has the interdict *Quorum bonorum*. The final result depends on whether he who has acquired the inheritance will be called to the *bonorum possessio* in the prætorian edict before, at the same time with or after him who acquired the *bonorum possessio*.² In the first case the heir may claim the whole of the estate; the *bonorum possessio* is therefore *sine re*. In the second case the heir may claim that part of the estate to which he as *bonorum possessor* was called; the *bonorum possessio* is therefore for that part *sine re*; for the remaining part *cum re*. In the third case the *bonorum possessor* may claim the inheritance; the *bonorum possessor* is therefore *cum re*.³ However, the *bonorum possessio sine re* becomes *cum re* when the heir effects that he shall be regarded as if he were not heir (see § 733, *infra*),⁴ and in the same manner the inheritance, so far as its efficacy is obstructed by a *bonorum possessio cum re*, becomes effective when the *bonorum possessor* effects that he shall be regarded as if he had not acquired the *bonorum possessio*.

E. THE BONORUM POSSESSIO IN THE LATEST JUSTINIAN LAW.

§ 661. The institute of the *bonorum possessio* was a means of supplementing to the rules on inheritance wherein they were deficient, and of modifying them so far as they were contrary to equity and to the prevailing views. The fulfillment of this object was assumed at a later period, and particularly under the Christian emperors, by the civil law. The rules on inheritance were at that time considerably remodelled, and in many particulars went further than the prætorian law. So that by the latest Justinian law the cases in which one might be called to the *bonorum possessio* only, and not simultaneously to the inheritance, are rare exceptions. In these cases the inheritance cannot be acquired otherwise than by assuming the *bonorum possessio* before the official authority;⁵ but if the *bonorum possessio* acquired is, as usual, *cum re*, its consequences are the same as those of the inheritance,⁶ because the property which vests in the *bonorum possessor* is no longer a mere bonitarian property, and between the *utiles* actions, which he may have and which may be instituted against him, and the proper *directæ* actions no practical difference longer exists.

¹ Hugo, *Rechtsg.* p. 607, *seq.*; Fabricius, *supra*, p. 208, *seq.*

² fr. 13. pr. D. 37. 4; fr. 2. §§ 6. 10. D. 38. 17; Ulpian, 13. § 6; 23. § 13.

³ §§ 9. 13. I. 13. 1; § 1. I. 3. 9. (10); fr. 12. pr. D. 38. 3; fr. 13. pr. D. 37. 4; fr. 15. § 1. fr. 22. D. 37. 5; fr. 10. D. 37. 6; fr. 2. D. 38. 6; fr. 2. §§ 6. 10. D. 38. 17.

⁴ fr. 12. 17. D. 28. 3.

⁵ Schirmer, *Erbrecht*, § 7, note 53, *seq.*

⁶ Of the interdict *Quorum bonorum* appertaining only to the *bonorum possessor*, see § 748, *infra*.

IX. SUCCESSIONABILITY.

§ 662. In order that anything may descend to one in case of death, he must have the requisite personal ability for it, which is usually termed successionability.¹ By the Roman law there are persons who are absolutely incapable of acquiring anything in case of death, either by a last will or *ab intestato*. They are—

1. Peregrini (non-Roman citizens).²
2. Heretics and apostates.³
3. Traitors, their sons and daughters; however, the daughters may acquire from their mother the birthright portion.⁴
4. All who were convicted of a capital crime.⁵
5. Communities not permitted or not approved by the state.⁶
6. Widows who have disregarded the mourning year cannot acquire by last will, and can only inherit *ab intestato* to kin to the third degree.⁷

SECTION SECOND.

OF THE DEVOLUTION OF THE INHERITANCE.

CHAPTER I.

INHERITANCE SUCCESSION.

SOURCES OF THE ANCIENT LAW.—Gaius, III. § 1-31; *Epit. Gaii*, 2. 8; Ulpian, 26; Paul, IV. 8-10; Coll. Leg. Mos. et Rom. tit. 16; Cod. Theod. 5. 1; Inst. 3. 1-6; Dig. 38. 6-8. 11. 16. 17; Cod. 6. 14. 15. 18. 55-59. For the modern law especially: Novel 118; Novel 127. pr. et c. 1.

LITERATURE.—*Donellus*, Comm. jur. civ. Lib. 9, cap. 1-4; *Stryk*, Tract. de successionibus ab intestato, Frankfort-on-the-Oder, 1733; *Koch*, Successio ab intestato, Giessen, 1798; *Hugo*, Comm. de fundamento successionis ab intestato, Göttingen, 1785; *Lintelo de Geer*, Disp. qua Nov. 118, Utrecht, 1841; *Glück*, Intestaterbfolge, Erlangen, 1822; *Gans*, Scholien zu Gaius, p. 300; *Roszhirt*, Intestaterbrecht, Landshut, 1831; *Ortloff*, Justinian's neue Verordnungen über die Intestaterbfolge, Coburg, 1816.

TITLE FIRST.

HISTORICAL INTRODUCTION.

I. INTESTATE SUCCESSION ACCORDING TO THE OLD CIVIL LAW.

§ 663. In calling to the legitimate inheritance the twelve tables do not look to the connection with the decedent by means of the natural bond of

¹ This term is somewhat inappropriate, as there are legacies which do not produce succession. See end of § 656.

² fr. 6. § 2. D. 28. 5.

³ Const. 4. 5. C. 1. 5; Const. 3. C. 1. 7.

⁴ Const. 5. §§ 1. 3. C. 9. 8.

⁵ fr. 13. D. 37. 1.

⁶ Const. 8. C. 6. 24. See §§ 155, 157, 703.

⁷ Const. 1. C. 5. 9. See § 582, *supra*.

kinship and marriage, but to the connection by means of paternal power *manus*, agnation, patronage and gentilism (*gens*). It was primarily conferred on—

1. The *sui heredes*, heirs of the body,¹ in its narrow sense, *i. e.*,

a. Those who at the moment of the estate leaver's death were immediately in his paternal power or *manus*, and by his death became *sui juris*.

b. On the *posthumi sui*, *i. e.*, those who at least were conceived at the estate leaver's death and subsequently attained the position that they would have belonged to the *sui heredes* in its narrow sense if the estate leaver had died after they had so become. All *sui heredes* in its wide sense were called at the same time and divided the inheritance as sons and daughters according to polls, but as more remote descendants, according to stocks (roots) (§ 672, *infra*). In this respect the wife *in manu mariti* was regarded as the husband's daughter.

2. If no *sui heredes* existed, and a female could not leave any,² then

a. The *proximus agnatus*³ was usually called, *i. e.*, the next among the agnatic collateral kin and among those who in consequence of the *manus* were regarded as collateral kin. Several equally near divided according to polls. With the next possible, *i. e.*, the second, class, the *consanguinei* and *consanguineæ*, no difference was made between the two sexes; but in other cases this kind of call by means of the *jus civile*, in its narrow sense, was restricted to males,⁴ regardless whether the inheritance were derived from a male or female.

b. If the inheritance were derived from a person manumitted from slavery,⁵ then, instead of the *proximus agnatus*,⁶ the patron was called; and if he were dead,⁷ his next agnatic descendants were called.⁸ This was analogically

¹ Gaius, III. § 1-8; Ulpian, 26. § 1-3; Coll. 16. 2. § 1; § 1-8. I. 3. 1; Glück, Intestaterbfolge, p. 178, *seq.*, 210, *seq.*; Hugo, Rechtsgeschichte, p. 259, *seq.*; Schirmer, Erbrecht, p. 127.

² Ulpian, 26. § 7.

³ Gaius, III. § 9, *seq.*; Ulpian, 26. §§ 1. 4. 5; Coll. 16. 2. § 9. *seq.*; 3. § 13. *seq.*; 4. § 1; pr. I. 3. 2; Glück, p. 214, *seq.*; Hugo, Rechtsg. p. 261, *seq.*; Schirmer, p. 133, *seq.*

⁴ Paul, IV. 8. § 22; also in Coll. 16. 4. § 20; Gaius, III. §§ 14. 23; Ulpian, 26. § 6; § 3. 1. 3. 2; Glück, p. 205, *seq.*, 216, *seq.*; Savigny, on the *lex Voconia*, in his Verm. Schriften, Vol. 1, No. 14, especially p. 432, *seq.*; J. J. Bachofen, Die *lex Voconia*, Basel, 1843, p. 20, *seq.*

⁵ Gaius, III. §§ 40. 45. 49; Ulpian, 27. §§ 1. 2. 4; pr. I. 3. 7. (8); Glück, p. 727, *seq.*; Hugo, Rechtsg. p. 263, *seq.*

⁶ By the *lex Julia et Papia Poppæa*, the patron, and in certain circumstances the patroness, in addition to the *sui heredes*, if there be not more than two and the manumitted person left an estate of at least 100,000 sesterces, shall have a poll portion: Gaius, III. § 42-52; Ulpian, 29. § 3-7; § 2. I. 3. 7. (8).

⁷ On the case when one of two patrons still lived, see Ulpian, 27. § 2.

⁸ When there were several, they divided according to polls: Ulpian, 27. § 4; Inst. 3. 8. (9); Dig. 38. 4.

applied to the case when the decedent was manumitted from the *mancipium*;¹ in this case the *parens* or the *extraneus manumissor* was called; and if he were dead, then his next agnatic descendants were called.

3. If none of the two preceding classes existed, then by the twelve tables the *gentiles* were called;² i. e., the members of the *gens* to which the estate leaver belonged, or whose name he bore in consequence of a manumission of himself or one of his ancestors by one of its members. This third class ceased to exist, and precise information respecting gentilism is wanting.³ Persons other than the above-named were not, according to the old law, called to the legitimate inheritance.⁴ And in the event of death it devolved only once; if they who were next called did not acquire it, then they who were excluded by those who were called did not take their place,⁵ "*in legitimis hereditatibus non est successio*" (there is no succession in legitimate inheritance), a rule which manifestly proceeds from a literal interpretation of the twelve tables.⁶

II. INTESTATE SUCCESSION ACCORDING TO THE PRÆTORIAN LAW.

§ 664. To the *intestati bonorum possessio* were usually called at the time of the classical jurists⁷—

A. 1. *Ex edicto unde liberi* (all children whose statutory title fails, but who are called by the prætor to the succession),⁸ the *sui heredes*, and those blood descendants who do not belong to the *sui heredes* because they were emancipated by the estate leaver, provided that they were not adopted in another family. The *emancipatus* of the estate leaver was gradually made equal to other blood children who from the nature of their descent might have been *sui heredes* and were not adopted in another family. The inheritance was divided in this class, the same as the civil law divided it among the *sui heredes*. Only when besides the *emancipatus* his own children were called as *sui*, by the edict *de conjungendis cum emancipato liberis ejus* of a *nova clausula*

¹ Coll. 16. § 9; §§ 3. 4. I. 3. 9. (10).

² Gaius, III. § 17; Coll. 16. § 4.

³ Gaius, III. § 17, says that he has mentioned in the Comment I. who the *gentiles* were. But this passage is wanting in the Veronese manuscript. The leading passages are: Cicero, Top. c. 6; de oratore, c. 39; Livy, X. 8; XXXIX. 19; Festus v. gens v. gentiles. On the different views, see C. F. Muchlenbruch, De veterum Romanor. gent. et familiis, Rostock, 1807; Niebuhr, Vol. 1; Glück, p. 228, seq.; Schirmer, p. 138, seq.

⁴ Gaius, III. § 18, seq.

⁵ But those who were called might have ceded the inheritance *in jure*: Gaius, II. § 35; III. § 85; Ulpian, 9. § 12, seq.

⁶ Gaius, III. §§ 9. 12. 17; Ulpian, 26. § 5; Paul, IV. 8. § 23; § 7. I. 3. 2; fr. 1. § 8. D. 38. 16; Glück, p. 157, seq., p. 225, seq.; Hugo, Rechtsg. p. 270, seq.; Schirmer, p. 255, seq.

⁷ Gaius, III. § 18, seq., especially § 26, seq.; Ulpian, 28. § 7, seq.; § 3. I. 3. 9. (10); Hugo, Rechtsg. p. 591, seq.; Glück, p. 338, seq.; Schirmer, p. 140–152.

⁸ Gaius, III. § 26; Ulpian, 28. § 8; § 9–13. I. 3. 1; Dig. 38. 6.

Juliani, he received only one half of the portion, which without these co-participants would have been given to him alone; the other half was given to his children.¹ After this first class, which could only occur when a male was to be inherited to, then

2. *Ex edicto unde legitimi heredes*,² the same persons were called who in this particular case by the civil law were called to the intestate inheritance succession; and the inheritance was divided among them as it was by the civil law.

3. *Ex edicto unde cognati*,³ all kin to the sixth degree, and even of those of the seventh degree, the *ex sobrino sobrinaque natus natave* (related through females), without distinguishing between agnates and simple cognates, and without distinguishing between descendants, ascendants and collaterals, but in such manner that the nearer in degree take precedence and that the equally near divide according to polls.

4. *Ex edicto unde vir et uxor*,⁴ that person was called who at the moment of the estate leaver's death lived in lawful marriage with him.

B. If the decedent had been manumitted *ex mancipio* and by an *extraneus*, then the foregoing rules were applicable, with the single exception that after the class of the *liberi* and before the *extraneus manumissor* to be called *ex edicto unde legitimi* or his descendants *ex edicto unde decem personæ*,⁵ the kin of the first and second degrees, but only these were called in the same manner as they usually were after the class of the *legitimi ex edicto unde cognati*.

C. If the decedent had been manumitted from slavery,⁶ then the four preceding classes in division A were called; but besides these there were three other classes called, namely, after the cognates and before the surviving husband or wife, first, *familia patroni*,⁷ and then *patronus, patrona item liberi et parentes patroni patronæque* (the children of the emancipator and emancipatress and their parents); and after the surviving husband or wife, *cognati manumissoris, qui ex lege Furia plus quam mille asses capere possunt*, i. e., the same who, if the manumittor were to be inherited to and it came to the class of cognates, would be called to his *bonorum possessio*. Of these classes of the *bonorum possessio* the succeeding would be excluded by the preceding only if one of the latter accepted the *bonorum possessio*, otherwise the present *successio ordinum* governed all.⁸ In several of the classes the *successio graduum* occurred, that is, if the nearer did not accept the devolved

¹ Thus also in the *contra tabulas bonorum possessio*: Dig. 37. 8.

² Gaius, III. §§ 27. 28; Dig. 38. 7.

³ Gaius, III. § 28-31; Ulpian, 28. § 9; Inst. 3. 5. seq.; Dig. 38. 8.

⁴ Coll. 16. 8; §§ 3. 4. I. 3. 9. (10); Dig. 38. 11.

⁵ Coll. 16. 9.

⁶ Ulpian, 28. § 7; Coll. 16. 9; Fragm. Vat. § 301; §§ 3. 4. I. 3. 9. 10; Glück, p. 728, seq.

⁷ In Justinian's Institutes it is termed "*tantum ex familia*."

⁸ Ulpian, 28. §§ 10. 11; § 4. in fin. 6. I. 3. 9. (10); fr. 1. pr. §§ 8. 10. D. 38. 9; Dig. 38. 15.

bonorum possessio, then the more remote of the same class were entitled, especially in the class of the *cognati* and in the class of the *cognati manumissoris*.

III. ACCORDING TO THE MODERN CIVIL LAW.

A. UNDER THE HEATHEN EMPERORS.

§ 665. By the prescripts of the civil law under the emperors changes were gradually made which went still further than the prætorian edict. The first two innovations of this kind were made under Hadrian and Marcus Aurelius.

1. The mother formerly was called to the *legitima hereditas* and to the *bonorum possessio ex edicto unde legitimi* only when she was *consanguinea*, that is, when she was in the father's *manus*, but if she were not she was called only to the *bonorum possessio ex edicto unde cognati*, had the *legitima hereditas* conferred on her by means of the *senatusconsultum Tertullianum* or *Tertullianum*,¹ even if she were not *consanguinea*, but if free-born have three children, and if manumitted have four children. She was thereupon called into the second class, provided that neither an agnatic brother nor a blood father acquired the inheritance, though the latter may have been called as *parens manumissor* or only to the *bonorum possessio cum re ex edicto unde cognati*. Subject to these conditions she competed with the agnatic sisters and preceded the other heirs of the second class. The passage "*in legitimis hereditatibus non est successio*" was not applied here. It obstructed neither the devolution by the *senatusconsultum Tertullianum* nor the further devolution to the one whom the mother preceded.

2. The children of a deceased wife, to whom formerly the same rules were applicable as those applicable to the mother previous to the *senatusconsultum Tertullianum*, are, by the *senatusconsultum Orphitianum*,² called unconditionally to the *legitima hereditas* before all others; but only the sons and daughters are called, and not the grandchildren, etc. If they refuse to accept, the inheritance further devolves according to the civil law.³

B. UNDER THE CHRISTIAN EMPERORS.

§ 666. The Christian emperors by their ordinances made still greater changes of a similar character:

1. Gradually there arose an intestate inheritance succession to what was left by a family son (*filiusfamilias*)⁴ after his death;⁵ a perfect assimilation

¹ Ulpian, 26, § 8; Paul, 4, 9; Inst. 3, 4; Dig. 38, 17; Glück, p. 240, seq.; Schirmer, p. 152, seq.

² Ulpian, 26, § 7; Paul, 4, 10; Inst. 3, 4; Dig. 38, 17; Glück, p. 255, seq.; Schirmer, p. 162, seq. See fr. 1, pr. D. 38, 17; Gaius, III. §§ 43, 51; Ulpian, 29, § 2.

³ The passage "*in legitimis hereditatibus non est successio*" (in statutory inheritance there is no succession) is also not applicable here: fr. 1, § 9, seq. D. 38, 17.

⁴ Glück, p. 278, seq.

⁵ See Const. 3, 4, 6, § 1, C. 6, 61. The Const. 3, is taken from Nov. Theod. tit. 14, § 8; Const. 7, § 1, C. 8, 59; Const. 11, C. 6, 59; Const. 36, C. 1, 3; pr. I. 2, 12.

of the foregoing with the intestate succession to the estate of an *homo sui juris* first resulted from the Novel 118.

2. Till the Novel 118. the kin succeeded in the whole according to the specified rules of the civil law of former times, and of the prætorian law, as *liberi* (children), as *legitimi* (statutory heirs), and as *cognati*.¹ But in many individual cases changes were made for the benefit of such persons as hitherto had to stand back as simple cognates;² especially for the benefit of a man's grandchild through his daughter, and for the wife's grandchild,³ also for the mother's benefit,⁴ as also for the brothers' and sisters' benefit,⁵ but of whom the whole blood were preferred to the half blood,⁶ and for the benefit of the sons and daughters of a pre-deceased brother or sister.⁷ Justinian repealed the former setting back of females in the succession of agnates as such,⁸ and introduced a succession by degrees (*successio graduum*).⁹ But in the Novel 118. he went still further, inasmuch as by it he wholly repealed the former order of inheritance succession of the kin and introduced that which is presented in the two following titles.

3. Under Justinian the surviving husband or wife (§ 679, *infra*), in connection with kin, and even with testamentary heirs, subject to certain conditions, in which indigence was included, also acquired a right of intestate inheritance. But in the Novel 117. this new right of inheritance is only allowed to the wife; so that the husband is again always, as the wife is generally, limited to the *bonorum possessio ex edicto unde vir et uxor*, which is more seldom conferred since the Novel 118. has given a greater extension to the preceding right of inheritance of kin.

4. An *extraneus manumissor* (a third person as fictitious manumittor)¹⁰ can no longer exist since Justinian's ordinance on the form of the manumission (§ 612, *supra*), and hence the *bonorum possessio ex edicto unde decem personæ* ceased. But the manumitting father or grandfather should always be regarded as *parens manumissor*, even if he were such no longer.¹¹ The Novel 118. does not specially treat on this point.

¹ Inst. 3. 1-6. (7); § 3. I. 3. 9. (10); Dig. 38. 6-10. 16. 17; Cod. 6. 14. 15. 55, *seq.*

² Glück, p. 272, *seq.*

³ Const. 4. Cod. Th. 5. 1 (see Const. 9. Cod. 6. 55; § 15. I. 3. 1; § 1. I. 3. 4); Const. ult. C. 6. 55; Novel 18. c. 4.

⁴ Const. 1. 7. C. Th. 5. 1; Const. 2. 7. C. 8. 59; §§ 4. 5. I. 3. 3.

⁵ § 1. I. 3. 5; Const. 4. C. 5. 30; Const. 5. C. 5. 70; Const. 15. §§ 1. 2. C. 6. 58.

⁶ Novel 84.

⁷ Const. 14. pr. § 1; Const. 15. § 3. C. 6. 58; § 3. I. 3. 2.

⁸ Const. 14. 15. C. 6. 58; § 3. I. 3. 2.

⁹ § 7. I. 3. 2.

¹⁰ Glück, p. 283, *seq.*; Glück, Comm. Vol. 35, p. 219, *seq.*; Vol. 37, p. 356, *seq.*; Schirmer, p. 187, *seq.*

¹¹ § 6. I. 1. 12; § 8. I. 3. 2; § 4. I. 3. 9. On the relation to the mother and to the brothers and sisters, see Const. 7. § 1. C. 6. 56; Const. 13. C. 6. 58; Const. 2. C. 6. 16.

5. Valentinian II. prescribed several new ordinances on the intestate succession to the estate of one manumitted ;¹ and Justinian by the Code wholly abolished,² in the intestate succession to such estate, not only the particular classes of the *bonorum possessio* which had been introduced, but also the right of inheritance allowed to the patron in the *lex Julia et Papia Poppæa*, subject to certain provisions in connection with the *sui*. The peculiarity in this case, by the modern Roman law, consists in that the patron is, and, if he be dead, his nearest descendants are, called after the descendants and before the remaining kin of the manumitted.

TITLE SECOND.

GENERAL PRINCIPLES OF THE JUSTINIAN LAW.

I. WHEN DOES SUCCESSION TO INTESTATE INHERITANCE OCCUR?

§ 667. The succession to intestate inheritance generally first occurs when there are no testamentary heirs or when none are to be expected (§ 657, *supra*).³ Thus :

1. When the decedent left no testament.
2. When the testament was invalid from its origin.
3. Even if it were originally valid, but subsequently became in such degree invalid that not even a *bonorum possessio secundum tabulas* (conferring of the estate according to the testament) could result from it.⁴ In the first and second cases the succession to intestate inheritance commences at the moment of the estate leaver's death ; in the third case, on the contrary, it must be observed whether the testament was invalid before or after the estate leaver's death. If before, then the succession commences at the moment of his death ; and if after, then when it is certain that there will be no testamentary heirs.⁵

II. OF THE RIGHT OF SUCCESSION TO INHERITANCE.

A. PRINCIPLE.

§ 668. The ability to succeed *ab intestato*, or the right of succession to intestate inheritance, in the abstract, presuming general successionability (§ 662, *supra*), rests, according to the modern Roman law,⁶

A. Chiefly on blood relationship to the estate leaver, without distinction between cognate and agnate.⁷ But the relationship must generally be founded

¹ Nov. Valentin. III. tit. XXIV. de libertis, § 2-8.

² Const. 4. C. 6. 4 ; §§ 2. 3. I. 3. 7. (8) ; § 4. I. 3. 9. (10).

³ pr. I. 3. 1 ; fr. 39. D. 29. 2 ; Const. 8. C. 6. 59.

⁴ See §§ 726, 728, 729, *infra*.

⁵ § 6. I. 3. 2 ; fr. 2. § 5. D. 38. 16.

⁶ Novel 118 ; Novel 127. pr. cap. 1.

⁷ Novel 118. c. 4. But the brother-in-law or sister-in-law has no right of inheritance : Const. 7. C. 6. 59 ; *Rechtsart, Erbrecht*, cap. 1, § 22.

on marital property, illegitimate children¹ and their descendants generally inherit to their legitimate mother and her kin,² and they, on the contrary, are not heirs to their mother or her kin as if they were legitimate children; on the other hand they do not inherit to their father and his kin, and his kin inherit to them as if they were legitimate children. Roman law the same rules govern as to children begotten in a marriage (§ 556, *supra*). However, the natural children, not only legitimated, are, with their descendants, equal to legitimate children. If their father die without leaving legitimate children or a lawful wife, even without legitimation shall receive, in conjunction with the ordinary intestate heirs, one sixth part of his estate, which they must divide with their mother;³ and the same quota which a child in this case may claim may be claimed by the father from the child's property, if it die before him.⁴

B. A right of intestate inheritance is also founded on adoption (§§ 596, 597, *supra*).

1. The arrogated persons and the children given in *adoptio plena* may inherit to their adopted father and his agnates, and, on the contrary, these may inherit to such children;⁵ but they do not inherit to the adopted father's wife and her kin.⁶

2. The children given in *adoptio minus plena* may inherit to their adopted father, but not to his agnates; and he does not inherit to them.⁷

3. The children adopted by a woman inherit to her, but not to her kin.⁸ Inheritability by adoption presumes that the bond of adoption continued till the estate leaver's death.¹¹ Adopted children of every kind may inherit to their blood parents, and the parents may inherit to such children.¹² It is

¹ See *Glück*, Intestaterbf. §§ 127-139, 155, 156; *Roszhirt*, Erbrecht, cap. 1, § 29; *Schirmer*, p. 209, *seq.*

² Const. 5. C. 6. 57. contains an exception which at present is inapplicable. It is thought that another exception is contained in Const. 6. C. 5. 5; Novel 12. c. 1; Novel 74. c. 6; Novel 89. c. 15; *Glück*, Comm. Vol. 35, p. 158, *seq.* See *Schirmer*, p. 226, *seq.*

³ § 4. I. 3. 5; § 3. I. 3. 4; Const. 5. C. 6. 57.

⁴ Novel 18. c. 5; Novel 89. c. 12. §§ 4. 6; *Schirmer*, p. 215, *seq.*

⁵ Const. 10. C. 5. 27; Novel 89. c. 8. c. 9. § 1; Novel 74. c. 2; cap. 1. X. 4. 17; *Glück*, Intestaterbfolge, § 139.

⁶ Novel 89. c. 13.

⁷ § 2. I. 1. 11; Const. 10. pr. § 5. C. 8. 48; §§ 2. 14. I. 3. 1; *Roszhirt*, Erbr. c. 1, § 23.

⁸ fr. 23. D. 1. 7.

⁹ Const. 10. § 1. C. 8. 48.

¹⁰ Const. 5. C. 8. 48.

¹¹ § 11. I. 3. 1.

¹² Because the blood relationship between them and their blood parents, through whom according to Novel 118. the right of succession is founded, continues notwithstanding their adoption. Therefore a mutual inheriting occurred already by

certain that the imperfectly adopted child inherits to his blood parents, as child, the same as previous to the Novel. But it is doubtful whether the arrogated person or the perfectly adopted child inherits in like manner to his blood father as child in the first class,¹ or only as kin in the fourth class, or whether the father inherits to him.

C. Several other persons, for special reasons, have a right of intestate inheritance to the decedent's estate, subject to conditions which will be discussed in § 679–682, *infra*.

B. WHEN THE INTESTATE HEIR MUST HAVE SUCCESSIONABILITY.

§ 669. The intestate heir must be continuously able to succeed, from the time that the inheritance succession devolves on him (§ 667, *supra*) till he enters into the inheritance.² But it matters not whether he was born, or was only in embryo, at the time of the devolution; if the embryo be born alive, as a human being (§ 130, *supra*), in the proper time (§ 584, *supra*), his right of inheritance is as valid as if he were born previous to the estate leaver's death.³

III. OF THE ORDER OF INHERITANCE SUCCESSION.

A. GENERALLY.

§ 670. Not all persons who have a right of inheritance succession in the abstract (§ 668, *supra*) attain the succession immediately on the estate leaver's death; the law prescribes for them a certain order, which is termed the order of inheritance succession, or the right of inheritance succession in particular.⁴ In the succession of kin this does not depend so much on the proximity of the degree of relationship to the estate leaver as it does on its nature, namely, whether one be descendant, ascendant or collateral kin of the inheritance leaver. For the more easy comprehension of this order of inheritance succession, the intestate successionable kin have been divided into four classes.⁵ In the first class succeed the estate leaver's descendants, regardless of the proximity of degree—all those descendants between whom and the estate leaver, in their stock, no living descendant intervenes. In the second class

the prætorian law, at least in the class *unde cognati*, in which Justinian in the *adoptio plena*, in Const. 10. C. 8. 48, makes no change. *Contra*: Glück, Comm. Vol. 35. p. 169, *seq.* See Vangerow, § 412; Schirmer, p. 201, note 17.

¹ This is maintained by Glück, Intestaterbf. § 157–159; Roushirt, pp. 106, 296, 397.

² fr. 1. § 4. D. 38. 17. See § 4. I. 2. 19; fr. 49. § 1. fr. 59. § 4. D. 28. 5; fr. 54. D. 29. 2.

³ According to the rule, *Nasciturus pro jam nato habetur, si de ejus commodo agitur* (the embryo is regarded as a future person, when it is for its benefit) (§ 130, *supra*). See fr. 1. § 5. D. 38. 17.

⁴ *Posse*, Erbfolgerecht und Erbfolgeordnung, Rostock and Leipzig, 1796.

⁵ These classes, though not founded on the words, yet are founded on the subject-matter, of the Novels 118. and 127.

succeed the next descendants according to degree—the estate leaver's brothers and sisters of the whole blood, and the sons and daughters of those brothers and sisters of the estate leaver, of the whole blood, who died prior to him. In the third class succeed the estate leaver's brothers and sisters of the half blood, and the sons and daughters of those brothers and sisters of the estate leaver, of the half blood, who died prior to him. In the fourth class succeed the nearest collateral kin, according to degree, who do not appear in the second or third class, without distinction whether they be of the whole or half blood.

B. SPECIAL PRINCIPLES.

§ 671. In the foregoing four classes the following principles govern :

1. The preceding class excludes the succeeding ; that is, so long as there is a person existing of a previous class, no heirs of a subsequent class can attain the succession.

2. In inheriting to an ascendant there is, for the benefit of his grandchildren, great grandchildren, etc., a right of representation, not limited to a particular degree, by virtue whereof the remoter descendants of the estate leaver take the place of their pre-deceased ancestor, and jointly receive so much of the inheritance as their pre-deceased ancestor would have received had he survived the estate leaver.¹ This right of representation was in the ancient law only for the descendants of the estate leaver, but it was not limited to any degree.² Justinian gave it also to the sons and daughters of the estate leaver's brothers and sisters of the half as well as of the whole blood, but only to these and not also to the grandchildren of the estate leaver's brothers and sisters, who therefore could not attain the succession in the second and third classes, but only in the fourth.³ The validity of this right does not depend, either in the case of the estate leaver's descendants or in that of the sons and daughters of his brothers and sisters, on that the person who, according to the statutory prescript, may take the place of his pre-deceased ancestor must also have been his heir.

3. In all of the four classes a succession of degree and order (*successio*

¹ The term *jus representationis* does not exist in the Roman law, though the subject-matter does : Novel 118. cap. 1. See § 6. I. 3. 1. On the whole doctrine, see Glück, *Intestaterbfolge*, § 23-26 b ; Normann, *Diss. de jure repræsentationis*, Hafniae, 1828 ; Büchel, *Streitfr.* p. 217-230.

² However, many jurists, e. g., Doles, *Diss. de jure repræsentationis*, Leipzig, 1778, and Glück, *supra*, remark that the estate leaver's descendants do not succeed *jure repræsentationis*, but *jure proprio*, and that with them the right of representation may occur only in relation to the division of the inheritance. From this arise incorrect distinctions between the right of representation in the first and that in the second and third classes. The cardinal error formerly was that incorrect consequences were deduced from the right of representation. Hence Büchel wholly discarded this term and used that of "statutory substitution." See Vangerow, § 414.

³ Novel 118. c. 3 ; Novel 127.

graduum et ordinum) takes place when the next of a class called is wanting and has no co-heirs whose portion is thereby increased;¹ or if these also are all wanting, then the inheritance devolves to such person as is the next called of the same class after him who is wanting (*successio graduum*). But if in the class to which belong the next called but wanting heirs there are no more inheritable persons existing, or if all the heirs of this class, according to the *successio graduum*, are wanting, then the inheritance devolves to the next called heirs of the following class (*successio ordinum*).²

IV. OF THE DIVISION OF THE INHERITANCE.

A. GENERALLY.

§ 672. When several kin are called at the same time to the inheritance, according to the statutory order of succession, then the question arises, to what quantity of the inheritance is each entitled?³ In relation to this question, the division of the inheritance may generally take place in the following manner:

1. The inheritance may be divided into as many equal parts as there are inheritable persons, of whom each receives a poll part (*portio virilis*). This kind of inheritance division is termed *succession in capita*.⁴

2. It may be divided into as many equal parts as the persons succeeding to it form stocks among themselves, so that a portion descends to each chief stock, who thereupon subdivide it among themselves either according to polls or again according to stocks. This is termed *succession in stirpes* (roots, stocks).

3. The inheritance may be divided into halves, of which one is given to the estate leaver's paternal ascendants and the other to his maternal ascendants, and each of which is subdivided, on their side, according to polls. This is termed the *successio in lineas*⁵ (lineal succession).

B. INFLUENCE OF MANIFOLD RELATIONSHIP ON THE DIVISION OF THE INHERITANCE.⁶

§ 673. Manifold relationship with the inheritance leaver (§ 146, *supra*) often gives a right to a number of portions of the inheritance, and always

¹ Glück, *supra*, §§ 45, 150, 152; Thibaut, System, §§ 680, 683. The views hereon are conflicting. See Fuchta, Pand. § 453, note y; Büchel, p. 171, *seq.*; Savigny, Syst. Vol. 8, p. 484, *seq.*

² This *successio graduum et ordinum* was based on the prætorian edictum *successorium*: Dig. 38. 9. It was, however, extended at an early period by Justinian in relation to the old inheritance succession. See § 7. 1. 3. 2; §§ 4. 5. 1. 3. 9. (10), and Ulpian, 28. 11. In Novel 118. he does not explicitly speak of it.

³ Schirmer, p. 270–276.

⁴ Novel 118. cap. 3. § 1.

⁵ Novel 118. cap. 2.

⁶ Klupfel, Über die Vielfachheit der Verwandtschaft, Stuttgart, 1793; Glück, Intestaterbfolge, § 39–41; Schirmer, pp. 286, 287.

where the division is made according to stocks (*in stirpes*) or according to sides (*in lineas*), but never where, in the beginning, it is divided according to polls.¹ In the latter case each poll is only counted once; in both the former cases he participates in the stock portion of each stock to which he belongs, or in the side portion of each side to which he belongs, and in this manner he is counted several times.²

TITLE THIRD.

SUCCESSION TO INTESTATE SUCCESSION PARTICULARLY.

I. INHERITANCE SUCCESSION OF KIN.³

CLASS FIRST.

§ 674. The succession is primarily acquired by all the estate leaver's inheritable descendants, existing at the accruing of the intestate inheritance succession, who of their stock are the nearest, regardless of sex, proximity of degree, paternal power, primogeniture, or whether they have sprung from the same marriage or from different marriages.⁴ If only descendants of the first degree exist, then the inheritance is divided according to polls; but in all other cases, therefore in that when all the descendants who acquire the inheritance succession spring from a son or a daughter of the estate leaver, it is divided according to stocks.⁵

¹ Justinian has not said this expressly, but it follows from the nature of the succession in *capita*, in *stirpes* and in *lineas*.

² It is frequently maintained, even by those jurists who hold the theory above presented to be correct, that with collaterals of the estate leaver the manifold relationship to him is always without influence on the quantity of the inheritance portion, because it can only arise with such collaterals as belong to the fourth class (?), but in this case is always divided in *capita*. See Glück, *supra*, p. 145. But it is possible that a *frater uterinus* (mother's son) of the estate leaver may marry a *soror consanguinea* (father's daughter) of the same, in which case the children begotten in such marriage are double nephews and nieces of the estate leaver, and as such, in the competition with their uncles and aunts, must receive double portions. See Schirmer, *supra*, note 47. At present is included the case when the estate leaver's brother and sister lived in a putative marriage and have begotten children. Though a collateral kin of the full blood is as such doubly related, yet this double relationship does not, by the Roman law, give him a right to two inheritance portions; for when it is the cause of his belonging to two stocks, then, by the Roman law, it is never divided according to stocks, but always according to polls. See the end of § 146, *supra*.

³ Here the subject-matter is the inheritance succession of blood kin only. On the succession and inheriting of adopted children, see § 596-598 and § 668, div. B, *supra*.

⁴ Novel 118. cap. 1-4; Glück, *supra*, § 153-162.

⁵ §§ 6. 16. I. 3. 1; Novel 118. cap. 1. In relation to the paternal usufruct of the *adventitium* of the children, the following cases should be observed:

1. When a family son dies leaving descendants, who are no longer in the power of the decedent's father, then they inherit the *peculium adventitium* of the decedent,

CLASS SECOND.

1. *Order of Succession.*

§ 675. If there be no inheritable descendants of the estate leaver, then the heirs of the second class succeed,¹ who are—

1. The estate leaver's next inheritable ascendants according to degree, regardless to which side they belong, so that the nearer ascendant not only excludes the remoter of his side, but also the remoter on the other side; but equally proximate ascendants on the same side, or on both sides, attain the succession at the same time.

2. The estate leaver's brothers and sisters of the whole blood, provided that, in relation to both parents, they are inheritable.²

3. The sons and daughters, but not the grandchildren, of the estate leaver's deceased brothers and sisters of the whole blood who died before him. All these persons attain the succession together.³

2. *Division of the Inheritance.*

§ 676. In this class the manner of dividing the inheritance according to the various competing cases is extremely various.

1. When ascendants only of one side attain the succession, then the inheritance is divided between them according to polls; when both sides attain the succession, then the lineal division takes place (§ 672, *supra*).

2. When only brothers and sisters of the whole blood and their children attain the succession, and there are only brothers and sisters existing, then the division is according to polls; if, on the contrary, brothers and sisters compete with children of previously deceased brothers and sisters of the estate leaver, then the division is according to stocks. If there be only sons and daughters of deceased brothers and sisters of the whole blood, then the inheritance is divided according to polls, that is, if they jointly spring from a brother or a sister; but if they spring from different brothers or sisters, then

excluding his father, but the latter retains for life the usufruct which he previously had: Const. 11. C. 6. 59; Const. 6. § 1. C. 6. 61.

2. When a grandfather has no longer his son in his power, but has his son's child, who dies without descendants. In this case the child's father inherits his *peculium adventitium*, excluding the grandfather, but the latter retains the usufruct which he previously had: Const. 3. C. 6. 61. See *Rosshirt*, *Erbrecht*, cap. 1, § 14-16; cap. 2, §§ 5, 9, 15; *Schirmer*, pp. 293, 294.

¹ *Glück*, § 163-186.

² Novel 118. c. 2. 3.

³ According to Novel 118. c. 2. the father shall inherit at the same time with the estate leaver's brothers and sisters of the whole blood (by whom he was excluded previous to the Novel, Const. 11. C. 6. 59; Const. 3. Const. 4. Const. 6. pr. § 1. C. 6. 61), but he shall not have the usufruct of the shares falling to the brothers and sisters (§ 605, *supra*): *Glück*, § 174.

it is doubtful whether, by the Roman law, the division should be made according to stocks or polls.¹

3. When ascendants compete with brothers and sisters of the whole blood and their children, then, if there be only such brothers and sisters competing with the ascendants, the division is according to polls; but if there be ascendants, brothers or sisters and sons or daughters of deceased brothers or sisters, then the ascendants and brothers or sisters receive poll parts, and the sons and daughters of the deceased brothers or sisters only stock parts; and when only sons and daughters of deceased brothers or sisters compete with ascendants, then the former only receive stock parts, while the latter obtain poll parts.

CLASS THIRD.

§ 677. If there be no heirs of the second class, then the third class attains the succession, which are—

1. The estate leaver's brothers and sisters of the half blood, whether they be *consanguinei* or *uterini* of the estate leaver.

2. The sons and daughters of half-blood brothers and sisters deceased before the estate leaver.² In regard to the division of the inheritance, the principles stated in div. 2, § 676, *supra*, govern this class. Whether the estate leaver obtained his property from the paternal or maternal side is immaterial in all the classes.³

CLASS FOURTH.

§ 678. In the absence of persons of any of the preceding classes, in the fourth class those collaterals, whether of the whole or half blood, attain succession who, according to degree, are the next of kin to the estate leaver,⁴ whether they be of the whole or half blood. If there be several equally near kin, then they attain the succession together and divide the inheritance according to polls.⁵

II. SUCCESSION OF OTHER PERSONS.

A. SUCCESSION OF HUSBAND OR WIFE.

§ 679. Besides kin, other persons have a right of succession, for special causes, such as—

The right of succession of the surviving husband or wife of the decedent. The cases in which such right occurs are the following:

¹ The dispute between Azo and Accursius respecting this was settled in Germany in favor of poll parts: *Glück*, § 175-180; *Roszhirt*, cap. 2, § 19; *Schirmer*, p. 277, *seq.*

² Novel 118. cap. 3; *Glück*, § 187-191.

³ *Glück*, p. 711; *Schirmer*, p. 289, note 50.

⁴ *Glück*, §§ 192, 193.

⁵ Novel 118. c. 3, at the end.

1. When a husband or wife dies without leaving heritable kin, or without being inherited to by them, then the survivor of the marriage succeeds; this is still the rule by the prætorian edict *unde vir et uxor* (§§ 664, 666, *supra*).¹

2. When a rich husband dies leaving a poor and undotated widow, then, by Justinian's ordinance, the widow has, in connection with the estate leaver's kin, a right to a part of his estate,² of which she cannot be deprived by any disposition by the husband.³ This part is thus determined: when she competes with more than three descendants of the husband, be they from a former marriage of the husband or from her own marriage, then she receives only a poll part;⁴ but in all other cases, that is, if she compete with three or less descendants or with other kin of the husband, be they many or few, she is entitled to a fourth part of the estate, but not more. She always acquires the property to the portion which she thus acquires with full power of alienation of it, excepting if she have children by her deceased husband, in which case this portion which is given to her as a poor widow she must retain for these children, and she has only the usufruct thereof for life.

B. SUCCESSION OF THE MANUMITTED AND HIS KIN.⁵

§ 680. If the estate leaver were a manumitted person, then, by the modern Roman law, if he have no descendants of his body, or if they will not accept the inheritance, the patron and after him the descendants of his body to the fifth degree, and then his collateral descendants to the fifth degree, are called to the intestate succession. Among the patron's descendants the proximate take precedence of the remoter, and several equally near divide according to polls⁶ (§§ 663, 664 and 666, *supra*).

C. SUCCESSION OF CERTAIN CORPORATIONS AND OF THE SOCIUS LIBERALITATIS PRINCIPIIS (MEMBER OF A PUBLIC BENEVOLENT SOCIETY).

§ 681. In default of all intestate and testamentary heirs of a decedent, his estate is adjudged to certain corporations of which he was a member; which, by the Roman law,⁷ are—

¹ § 6. I. 3. 9. (10); Dig. 38. 11; Cod. 6. 18; *Roszhirt*, *Erbrecht*, cap. 1, § 26; *Schirmer*, p. 232, *seq.*

² Novel 117. cap. 5. The earlier ordinances to which these novels relate are Novel 22. c. 18; Novel 53. c. 6; Novel 74. c. 5. On the whole doctrine, see *Glück*, § 117-126; *Roszhirt*, *Erbrecht*, ch. 1, § 28.

³ Novel 53. cap. 6. By this Novel the poor widower was entitled to a fourth, but of which he was expressly deprived by Novel 117. c. 5. (§ 579 and § 666, div. 3, *supra*).

⁴ However, the descendants belonging to the same stock are counted as one person.

⁵ The case of the guardian of a demented person, called as such to the succession, does not belong here, but to the cases which appear in § 738, div. II. B. 4, *infra*.

⁶ (In the *assignatio liberti* (child of one manumitted), see § 663, note 8, *supra*).

⁷ The provisions of divisions 1-4 at present are not applicable.

1. The *curia*, when a decurion dies without heirs.¹
2. The *cohortales*² of the provinces in which a *cohortalis* died without heirs.³
3. The *collegium naviculariorum* (shipowners).⁴
4. The *collegium fabricensium*.⁵
5. The regiment in which he was a soldier.⁶
6. The church of which he was a minister, and the cloister of which he or she was a monk or nun.⁷ Besides which, if the decedent, in common with another, receive a gift from the regent, and died without heirs, his portion of the gift descends to the *socius liberalitatis principis*; but as such *socius* receives only the decedent's portion, he is not to be regarded as his heir, but only as his several successor.⁸

D. SUCCESSION OF THE FISCUS.

§ 682. If there be none of the afore-mentioned intestate heirs and successors, then the estate is heirless (*bona vacantia*), and as such⁹ falls to the *fiscus*,¹⁰ who, however, must exercise his right within four years, otherwise the estate remains in him who possesses it.¹¹ It is disputed whether the *fiscus*, when he accepts the heirless estate, is thereby to be regarded as universal successor, or only as privileged occupant by virtue of the state's sovereign right to the *bona vacantia*; ¹² however, he can claim only the remainder of the estate after satisfying the estate leaver's creditors and legatees.¹³ But whether he is bound for the debts beyond the means of the estate depends on whether

¹ Const. 1. C. Th. 5. 2; Const. 4. C. 6. 62; Const. 1. C. 10. 34.

² *I. e.*, the officials and official servants of the provincial stadtholder.

³ Const. 3. C. 5. 54.

⁴ Const. 1. C. 6. 62.

⁵ Workmen in the imperial armory: Const. 5. C. 6. 62.

⁶ The legion: fr. 1. 2. D. 38. 12; fr. 6. §§ 6. 7. D. 28. 3. The mounted life guard: Const. 2. C. 6. 62.

⁷ Const. 20. C. 1. 3; Novel 131. c. 13; *Glück*, §§ 203, 204; *Roszhirt*, cap. 1, §§ 32, 33. At present a similar right is allowed to the almshouses and hospitals when one of their inmates, and to academies when one of their members, dies heirless; which right, however, must be specially conferred by the legislature.

⁸ Const. un. C. 10. 14; *Glück*, § 205.

⁹ This claim of the state treasury was first introduced by the *lex Julia et Papia Poppæa*, for the benefit of the *ærarîi populi Romani* (Roman public treasury).

¹⁰ fr. 2. D. 38. 9; Const. 1. 4. C. 10. 10; *Maier*, Von der succession des Fiscus, Ulm, 1786.

¹¹ fr. 10. pr. § 1. D. 44. 3; *Unterholzner*, Verjährungslehre, Vol. 2, § 301.

¹² The former, which, according to fr. 13. § 9. fr. 20. § 7. fr. 54. D. 5. 3; fr. 1. pr. D. 38. 9; Const. 5. C. 10. 10; Novel 1. c. 1. § 3. and other passages, appears to be the more correct view, is maintained by *Cujas*, Comm. ad L. 4. C. de bon. vac.; *Glück*, § 206. The latter view is maintained by *Roszhirt*, cap. 1, § 30. See *Schmidt* (Ilmenav.), De successione fisci in bona vacantia, Jena, 1836; *Rummel*, Das Verhältnisz des Fiscus zu den bona vacantia, Dorpat, 1840.

¹³ fr. 11. D. 49. 14; fr. 96. § 1. fr. 114. § 2. D. 30; *Glück*, § 209.

he is to be regarded as heir or only as occupant, and on this depends the question *which* fiscus is entitled to claim the *bona vacantia*. For if the fiscus be heir, then the fiscus of the estate leaver's domicile can claim the whole estate, even should it be situated in another country; if he be occupant only, then the heirless property situated in various countries enures to the various state treasuries.¹

CHAPTER II.

TESTAMENTARY SUCCESSION.

ON THE WHOLE DOCTRINE.—*Donellus*, Comm. jur. civ. Lib. 6, cap. 4–28; *Stryk*, De cautelis testamentorum, Halle, 1738; *Claproth*, Abh. von Testamenten, etc., Göttingen, 1797; *Westphal*, Theorie des Röm. Rechts von Testamenten, etc., Leipzig, 1790; *Glück*, Comm. Vol. 33, p. 311, *seq.*; Vol. 34–42, p. 228; *Roszhirt*, Das testamentarische Erbrecht bei den Römern, 2 vols., Heidelberg, 1840.

NOTION OF A LAST WILL.

§ 683. By a last will is understood every disposition made by one relative to his estate in the event of his death.² The one who makes such disposition is not bound by it; he may revoke or change it at any time, and only the will that exists at the time of death has force and efficacy.³

KINDS OF LAST WILL.

§ 684. By the Roman law the last will of a person is either a testament or a codicil. A testament in the Roman sense is a last will which at least contains the institution of one direct heir.⁴ A codicil (*codicillus*) is such a last will as makes no disposition respecting the direct inheritance succession, but, presuming the existence of either a testamentary or an intestate succession, contains only other dispositions in the event of death.⁵

¹ *Glück*, § 208.

² fr. 1. D. 28. 1. "*Testamentum est voluntatis nostræ justa sententia, de eo, quod quis post mortem suam fieri velit*" (a testament is the published declaration of our will according to law, respecting what one directs to be effected after his death): Ulpian, XX. § 1.

³ fr. 4. D. 34. 4. "*Ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum*" (the testator's will is changeable till the last breath of life).

⁴ § 34. I. 2. 20. "*Testamenta ex institutione heredis vim accipiunt, et veluti caput et fundamentum totius testamenti intelligitur heredis institutio*" (formerly a legacy was invalid if bequeathed before the institution of the heir, and therefore that institution is regarded as the head and foundation of the entire testament). See fr. 1. § 3. D. 28. 6. fr. 20. D. 29. 7.

⁵ § 2. I. 2. 25; Const. 14. C. 6. 23. "*Non codicillum sed testamentum aviam vestram facere voluisse, institutio et exhereditio facta probant evidenter*" (that your grandmother did not want to make a codicil, but a testament, is unquestionably shown by the institution of the heir and the disinherison).

TITLE FIRST.

TESTAMENTABILITY.

CONDITIONS OF THE TESTAMENTI FACTIO (TESTAMENTABILITY).¹

I. FREEDOM AND CITIZENSHIP.

§ 685. The ability to make a testament is termed testamentability (*testamenti factio*).² By the Roman law the first condition thereof is that the testator must be a freeman and a Roman citizen. Hence slaves³ and all *peregrini* (non-Roman citizens, § 131, *supra*) were incapable, and so consequently was every quondam citizen who had suffered a *maxima* or *media capitis deminutio* (loss of status).⁴

II. ABILITY TO POSSESS PROPERTY.

§ 686. The second condition is that the testator must possess property and be capable of transmitting it after death. Hence every one who was in the power (*potestas*)⁵ of another was incapable of testamentation. The reason was, *quia filiusfamilias nihil suum habet* (the family son had naught himself).⁶ Although this reason ceased after the origin of the *peculii adventitii*, yet by the modern law the family son continued incapable to testamentate.⁷ But he may dispose by last will of his *castrense* and *quasi castrense peculium*.⁸

¹ Ulpian, XX. § 10, *seq.*; Gaius, II. § 112, *seq.*; Paul, III. 4 a; Inst. 2. 12; D. 28. 1; Cod. 6. 22; Heineccius, Diss. de origine testamenti factionis, Frankfort, 1726; Glück, Comm. Vol. 33, p. 347, *seq.*; Vol. 34.

² fr. 4. 18. pr. D. 28. 1. But the ability to acquire something by a last will is also termed *testamenti factio*: § 4. 1. 2. 19; fr. 16. pr. D. 28. 1; fr. 7. D. 41. 9. Therefore the moderns distinguish between *testamenti factio* active and passive. The latter will be treated in § 703, *infra*.

³ Also the former *latini Juniani* and *dedititii* (§ 132, *supra*): Gaius, I. § 23; III. § 56; Ulpian, XIX. § 4; XX. §§ 8. 14; Glück, Comm. Vol. 34, p. 53; Vangerow, De latini Juniani, p. 111.

⁴ fr. 8. D. 28. 1. So especially he who was taken prisoner by an enemy. If, however, he die in such imprisonment, a testament made previous to the imprisonment was, by virtue of the *fiction legis Cornelie*, sustained: Ulpian, XXIII. § 5; § 5. I. 2. 12; fr. 12. D. 28. 1; fr. 16. 18. D. 49. 15. Also the penal slave (§ 132, *supra*) and they who were condemned to death: fr. 8. § 4. fr. 13. § 2. D. 28. 1. The *Auth. Omnes peregrini*, C. 6. 59, speaks only of foreigners and travellers, and confers on them the right of making a testament wherever they may be tarrying. At present they who are condemned to death may testamentate. But see Glück, Comm. Vol. 39, p. 37, *seq.*

⁵ Or also in the *manus* or the *mancipium*, which formerly existed.

⁶ Ulpian, XX. § 10; fr. 6. pr. fr. 19. D. 28. 1; Glück, Comm. Vol. 34, § 1407 a, p. 97.

⁷ pr. I. 2. 12; Const. 11. C. 6. 22; Const. 8. § 5. C. 6. 61.

⁸ Ulpian, XX. § 10; Gaius, II. § 106; § ult. I. 2. 11; pr. I. 2. 12; fr. 18. pr. D. 45. 3; Const. 11. 12. C. 6. 23; Const. 37. pr. C. 3. 28. The *filiusfamilias*, with per-

III. ABILITY TO DECLARE A LAST WILL.

§ 687. The third condition is that the testator must have sufficient physical and mental ability to declare his last will in a valid manner. For this reason the following are incapable to testamentate:

1. They who can neither speak nor write.¹ Deaf mutes, who are not so from birth, may testamentate if they can write; but if they can only declare their wills by signs, or if they are deaf and mute from birth, they require special permission therefor from the regent.²

2. Every one who, at the time of making his testament, lacks understanding and freedom of will; hence particularly the *furiosus* (insane) and the *prodigus* (squanderer).³ Great age and sickness are no obstacle, so long as there is sufficient understanding and discretion.⁴

3. *Impubescents*, even with the assent of their tutor, cannot testamentate;⁵ minors, after having attained puberty, may make a will, even without the curator's consent.⁶

IV. NOT *LEGE INTESTABILIS* (DEPRIVED OF TESTAMENTATION).

§ 688. There are persons who are deprived by law of testamentation as a punishment (*lege intestabiles*).¹ These, by the Roman law, are wanton libel-

mission of his *paterfamilias*, may make a *donatio mortis causae* of his *peculio profectitio*: fr. 25. § 1. D. 39. 6. A soldier, if it be uncertain whether he be still in the paternal power, may make a valid testament: fr. 11. § 1. D. 29. 1; fr. 9. D. 29. 7.

¹ Const. 29. C. 6. 23. On a testament made by a dying person, by responding to questions propounded to him by a third person, see Glück, Comm. Vol. 34, p. 23.

² By the ancient law the deaf and the mute could not testamentate: Ulpian, XX. § 13; fr. 6. § 1. fr. 7. D. 28. 1. See fr. 4. D. 29. 1. By Justinian's ordinance both may testamentate; the mute, however, only if he write the entire testament himself; but the deaf mute, if he be so from birth, cannot testamentate: § 3. I. 2. 12; Const. 10. C. 6. 22.

³ The testament made before insanity or before interdiction of the squanderer (*prodigus*) continues valid: § 2. I. 2. 12; fr. 18. pr. D. 28. 1; Const. 9. C. 6. 22.

⁴ fr. 2. D. 28. 1; Const. 3. C. 6. 22.

⁵ § 1. I. 2. 12; fr. 19. D. 28. 1. In the computation of the age for testamentability, the rule is applied, *dies cæptus pro completo habetur* (when the day has begun, the matter depending thereon is fulfilled): fr. 5. D. 28. 1. See § 195, *supra*, and the authorities cited in note 9 thereto; Schultes, Über die Mündigkeit zum Testiren, Jena, 1800: Glück, Comm. Vol. 33, p. 395.

⁶ fr. 20. § 1. D. 34. 3. By the most ancient law neither impubescent nor pubescent females might in general dispose by will, excepting when, like vestals, they were freed from tutelage. But this was gradually changed, till finally they became entirely free from tutorship, and, in relation to their ability to act, were rendered equal to males (§ 615, *supra*, note 2); Cicero, Top. c. 4; de republ. 3. 10; Gaius, I. §§ 115 a. 142; II. §§ 112. 113. 122; III. § 43; Ulpian, XX. § 15; Savigny, Verm. Schriften, Vol. 1, No. 10.

⁷ fr. 18. § 1. D. 28. 1; Theophilus ad § 6. I. 2. 10; Glück, Comm. Vol. 34, p. 68, *seq.*

lers,¹ apostates and some kinds of heretics.² The ordinance that they who live incestuously may only testamentate for the benefit of certain near kin³ is repealed by the later Justinian law.⁴

TITLE SECOND.

OF THE FORM OF THE TESTAMENT.⁵

GENERAL DIVISION.

§ 689. In relation to their external form, by the modern Roman law testaments are⁶ either such as are formed under public authority (*testamenta publica*) or private testaments (*testamenta privata*).

PUBLIC TESTAMENTS.⁷

§ 690. A testament may be made under public authority in two ways:

¹ fr. 18. § 1. D. 28. 1; fr. 21. pr. D. 22. 5; fr. 3. §§ 9. 10. D. 47. 10.

² Const. 1. C. 1. 7; Const. 4. § 5. C. 1. 5; Novel 115. c. 3. § 14.

³ Const. 6. C. 5. 5.

⁴ Novel 12. c. 1. 3. By the canon law they who take usurious interest, and do not reimburse it, cannot testamentate: cap. 3. X. 3. 28; cap. 2. § 1. *de usuris* (5. 5) in 6to.

⁵ On the form of testaments, see Gaius, II. § 101–108; Ulpian, XX. § 2–9; Inst. 2. 10; Dig. 28. 1; C. 6. 23; Cicero, De nat. Deor. II. 3; Gellius, XV. 20; *Heineccius*, Diss. de origine testamenti factionis, Frankfort, 1726; *Savigny*, Röm. Rechts im Mittelalter, 2d ed. Vol. 1, p. 107; Vol. 2, p. 189; *Dernburg*, Beiträge zur Geschichte der Röm. Testamente, Bonn, 1821; *Gans*, Scholien zu Gaius, p. 279; *Glück*, Comm. Vol. 34, § 1408–1412 c.

⁶ In the ancient times the external form of a testament consisted in that it was made either *in calatis comitiis* (in a summoned comitium) or *in procinctu* (armed for battle): Inst. 2. 10. But already at an early period a testament could also be made *per aes et libram* (weight and scales), or, in other words, *per familiæ mancipationem et testamenti nuncupationem*, at which seven pubescent male Roman citizens had to be assembled: five as witnesses, one as *libripens* (scales-holder), and the other as *familiæ emtor*. For some time the heir was made one of the assembly, but at a later period the *familiæ emtor* took his place. Both the original forms gradually became disused. The prætor also awarded the *bonorum possessio* on a testament, in which the civil form was defective, but which was sealed by seven pubescent male Roman citizens assembled. Thus there were, at the time of the classical jurists, a civil testament *per aes et libram* and a prætorian testament. However, soldiers, since the time of Trajan and Hadrian, might testamentate without any form, but Justinian only permitted this in a campaign. By custom, under the emperors, the form of a judicial testament arose, which is only once mentioned in the sources, namely, in an ordinance of Honorius and Theodosius, wherein also the form of the *testamenti principi oblatis* (presenting to the regent) is declared sufficient. Theodosius II. issued a new ordinance respecting the testament to be made before seven citizens, whereby all distinctions between the form of the prætorian testament and of the civil testament were repealed. To which later emperors added a number of rules.

⁷ *Donellus*, Comm. jur. civ. Lib. 6, c. 6.

either by the testator presenting it to the regent (*testamentum principi oblatum*), or by giving it to a magistrate possessing civil jurisdiction, to be recorded (*testamentum actis magistratus insinuatam*, now usually termed *testamentum judiciale*).¹ In neither case are further formalities required, because of the public authenticity founded on the presentation to the regent or the officers of the law.²

PRIVATE TESTAMENTS.³

§ 691. Private testaments, which may be made orally (*per nuncupationem*) as well as in writing (*per scripturam*), require the observance of several other formalities. The external form of a private testament is either ordinary or extraordinary. The former is the rule, the latter the exception, and consists in the diminution or the increase or the change of the usual formalities.

I. THE ORDINARY FORM OF TESTAMENTS.

A. GENERAL REQUISITES.

§ 692. To the ordinary form of a private testament, be it oral or written, appertains—

1. The presence of seven witnesses.⁴ They must have been specially invited, that is, the testator must have declared to them that his object was to make a testament and that he desired them to witness it;⁵ they must at the time of the making of the testament⁶ be capable of being such witnesses, and must be voluntarily in the presence of the testator for this purpose;⁷ it is not requisite that they should be acquainted with him personally. All persons who lack understanding or will, impubescents, the deaf and the mute,⁸ the blind, at least in written testaments,⁹ judicially declared squanderers, *lege intestabilis* (§ 688, *supra*),¹⁰ females, non-Romans,¹¹ especially all persons who

¹ Both kinds of public testaments are treated in Const. 19. C. 6. 23; *Walch*, De testamento principi oblato, in his works, Halle, 1785, T. 1, p. 120; *Savigny*, Röm. Rechts im Mittelalter, 2d ed. p. 107; *Glück*, Comm. Vol. 34, p. 156, *seq.*, p. 188, *seq.*

² Respecting the admissibility of the presentation of a public testament by one authorized, see *Glück*, Vol. 34, p. 91, *seq.*, and Vol. 38, p. 305, *seq.*

³ *Donellus*, Comm. jur. civ. Lib. 6, c. 7–10.

⁴ Const. 21. C. 6. 23; § 3. I. 2. 10. If a notary be introduced, he may take the place of a witness: fr. 27. D. 28. 1. (*questio Domitiani*); *Glück*, Comm. Vol. 34, p. 287.

⁵ fr. 21. § 2. D. 28. 1.

⁶ It is not invalidated by their subsequently becoming incompetent: fr. 22. § 1. D. 28. 1; § 7. I. 2. 10.

⁷ fr. 20. § 10. D. 28. 1; Const. 9. 12. C. 6. 23. See Const. 3. § 2. C. Th. 4. 4.

⁸ §§ 5. 6. I. 2. 10.

⁹ A testament may be sealed at night: fr. 22. § 6. D. 28. 1.

¹⁰ fr. 26. D. 28. 1; fr. 14. 15. D. 22. 5.

¹¹ § 6. I. 2. 10. See fr. 20. § 4–7. D. 28. 1.

are in the testator's paternal power,¹ the instituted heir himself,² and all persons standing under such heir's power,³ are incapable of being such witnesses.

2. The making of a testament must be a unity (*unitas actus*), that is, all the witnesses must be present at the same time and the testamental act must not be interrupted by any business foreign thereto.⁴

B. SPECIAL REQUISITES.

1. Of Written Testaments.⁵

§ 693. When the testator desires to make a private testament he may—

1. Write it himself entirely (holograph testament), in which case he need not subscribe his name,⁶ but instead, it states that he wrote it himself entirely.

2. He may have it written by another (allograph testament), in which case he must acknowledge it in the presence of seven witnesses and subscribe it with his name.⁷ If he cannot write, whether he never learned it or is prevented by lameness of the hand or sickness, then, besides the seven witnesses, there must be another, *octavus subscriptor*, who must subscribe the testator's name for him and note that he does it at the special request of the testator.⁸

3. Thereupon the testament, be it written by the testator himself or by another for him, is to be placed by the testator before the witnesses with the declaration that it is his, the testator's, testament, and then each witness must subscribe and seal it,⁹ for which any seal may be used, even the testator's.

¹ § 9. I. 2. 10.

² § 10. I. 2. 10; fr. 20. pr. D. 28. 1.

³ § 10. I. 2. 10; fr. 20. pr. D. 28. 1. But it matters not that the witnesses between themselves stand in the relation of paternal power: § 8. I. 2. 10; fr. 22. pr. D. 28. 1; Ulpian, XX. § 3-6. The legatees and fideicommissaries may be witnesses: § 11. I. 2. 10.

⁴ fr. 21. § 3. D. 28. 1; § 3. I. 2. 10; fr. 20. § 8. D. 28. 1. And especially Const. 21. pr. § 2. Const. 28. pr. C. 6. 23; the exceptions to the rule are stated in the latter: Glück, Comm. Vol. 34, p. 375.

⁵ Glück, Comm. Vol. 34, p. 384, *seq.*

⁶ Const. 28. pr. § 1. C. 6. 23. The testator may testamentate in any language in a written testament: fr. 20. § 9. D. 28. 1. and Const. 21. § 4. C. 6. 23. But he cannot use cipher writing: fr. 6. § 2. D. 37. 1.

⁷ Const. 21. pr. C. 6. 23.

⁸ Const. 28. § 1. C. 6. 23. Comp. Const. 29. C. 6. 23. with Novel 119. c. 9. and Auth. *et non observato* C. 6. 23. But this applies only to the case where the testator cannot write, but not when he can and will not subscribe himself: Glück, Comm. Vol. 34, pp. 47, 403. But if he who at the request of the testator writes his testament is himself to receive something thereout, either as heir or legatee, then he may not write the passages affecting himself, or he must require the especial confirmation thereof by the testator. This is prescribed by the *senatusconsultum Libonianum*, which applies the penalty of the *Lex Cornelia de falsis* to this case: Rubr. Dig. 48. 10; Cod. 9. 23; fr. 1. D. 34. 8; fr. 29. D. 26. 2; Daniels, Diss. de Secto Liboniano, Bonn, 1791.

⁹ § 5. I. 2. 10; fr. 22. §§ 2. 5. fr. 30. D. 28. 1. On the difference between sub-

4. Where the testator desires to keep the contents of his testament secret, he may present it to the witnesses enclosed, but in which case he must declare in their presence that the envelope contains his last will, written by himself or by another, and then his signature must be affixed on the envelope. If he cannot write, an *octavus subscriptor* must also in this case write it for him. Then follow the signatures and seals of the witnesses on the envelope. With the signing and sealing of the witnesses the testamental act is closed, and the testament is said to be solemnized.¹

2. Oral Testaments.

§ 694. When the testator desires to make an oral testament (*per nuncupationem*), then he must declare his last will, and especially the names of the heirs, perfectly, clearly, and in language understood by the seven witnesses, who must be present.² If such an oral testament, at its delivery or subsequently, for the purpose of proof be reduced to writing, which may be done without any formalities, then it is termed a *testamentum nuncupativum in scripturam redactum* (nuncupative testament reduced to writing); but it does not therefore cease to be an oral testament.³ And in default of such writing, its existence, either in relation to the observance of its statutory external form or to its contents, may be proved by two witnesses who were present or by two other credible witnesses.⁴

II. EXTRAORDINARY FORM OF TESTAMENTS.

A. WITH INCREASED FORMALITIES.

1. Testaments of the Blind.

§ 695. Extraordinary and increased formalities are required in the testament of a blind person.⁵ Should a blind person testamentate orally, his will must be committed to writing by a notary, summoned for the purpose, in the presence of all the witnesses, and after the notary has read it to the testator he and the witnesses must sign and seal it. But if the blind person has had his will written by another person, then the notary must read it to the testator in the presence of the witnesses, and then with the witnesses sign and seal it. If no notary can be procured, an eighth witness takes his place.⁶

scription and superscription by the witnesses, see *Savigny*, *Gesch. des Röm. R. im Mittelalter*, Vol. 2, 2d ed. p. 189-193. See generally *Glück*, *Comm.* Vol. 34, p. 419 and p. 444.

¹ Const. 21. pr. C. 6. 23.

² § ult. I. 2. 10; fr. 21. pr. fr. 25. D. 28. 1; Const. 21. § 2. C. 6. 23; *Glück*, *Comm.* Vol. 35. § 1417, *seq.*

³ *Nettelbladt*, *De testamento nuncupativo in scripturam redacto*, Halle, 1753.

⁴ *Contra*, *Thibaut*, *Syst. der Pandekt.* § 740.

⁵ It is generally understood that a blind person may make a legal testament like one possessing sight.

⁶ Const. 8. C. 6. 22; Novel Leon. 69; *Glück*, *Comm.* Vol. 34, p. 26; *Koschne*, *De forma testamenti externa*, Göttingen, 1781.

2. *Testaments of Mutes.*

§ 696. A mute can make only a written testament, which must be written entirely by himself. If entirely or partly written by another it is invalid, even if the mute subscribe it.¹

B. WITH DIMINISHED FORMALITIES (PRIVILEGED TESTAMENTS).²1. *Testamentum Militis.*³

§ 697. The usual formalities are diminished in a soldier's testament made on the field—*testamentum militis s. jure militari factum*.⁴ In such testament no solemnities need be observed; he may make it as he pleases, and the testament is valid, only it must be certain that he actually made a testament. He may therefore write it himself or have it written by another, or he may make it orally if he declare his last will before some persons summoned for this purpose, but who are then to be regarded only as witnesses for proof, and as such are not even necessary if the testament can be proved otherwise.⁵ The same privileges are accorded to other persons belonging to the army⁶ who properly are not soldiers, however, only when their lives are in actual danger (*testamentum quasi militare*). If they escape this danger, then the testament becomes invalid;⁷ while the testament made by an actual soldier in the field continues valid after his return from the field, and even for a year after his discharge, if such discharge were not dishonorable.⁸ A soldier may also confirm on the field without further solemnities an unsolemnized private testament made before entering on the campaign.⁹ The soldier has other important privileges with respect to the contents of his testament,¹⁰ which he possesses only when he testamentates *jure militari*; that is, when he makes his testament on the field.¹¹

¹ Const. 29. C. 6. 23. See § 687, *supra*, note 2.

² *De La Couture*, Diss. de privilegiariis testamentis apud Romanos, Utrecht, 1825; *Glück*, Comm. Vol. 42, §§ 1473–1479, 1484–1486.

³ Gaius, II. § 109; Inst. 2. 11; Dig. 29. 1; Dig. 37. 13; Cod. 6. 21; *Donellus*, Comm. jur. civ. Lib. 6, c. 28; *G. F. Hænel*, Diss. I. Leipsic, 1815; Diss. II. 1816; *Glück*, Comm. Vol. 42, § 1474–1478.

⁴ In peace the soldier must observe the usual formalities: Const. 17. C. 6. 21; § 3. I. 2. 11. On the ancient law, see fr. 4. fr. 7–9. fr. 26. pr. fr. 38. pr. 42. D. 29. 1; Const. 5. C. 6. 21.

⁵ pr. § 1. I. 2. 11; fr. 1. pr. fr. 24. fr. 40. pr. D. 29. 1; Const. 1. 3. C. 6. 21.

⁶ But whether they who do not belong to the army have such is disputed. See *Glück*, Vol. 42, p. 54, *seq.*

⁷ fr. 44. D. 29. 1; fr. un. D. 37. 13.

⁸ § 3. I. 2. 11; fr. 21. fr. 26. fr. 38. fr. 42. D. 29. 1; Const. 13. C. 6. 21.

⁹ § 4. I. 2. 11; fr. 3. D. 29. 1.

¹⁰ See thereon § 656, § 703, note 2; notes 5, p. 523, and 1, p. 524; note 3, p. 525; §§ 718, 722, 725, note 4, p. 542; 728, note 3; 775.

¹¹ § 6. I. 2. 13; *Thibaut*, System der Pandekten-Rechts, § 705; *Hartitzsch*, Erbrecht, § 400; *Glück*, Comm. Vol. 42, p. 45, *seq.*

2. *Testaments Made in the Country* (*ruri conditum*).

§ 698. For a testament made in the country five capable witnesses are sufficient if a greater number cannot be had (§ 692, *supra*), one of which may sign for several or for all if they cannot write, and which is also valid without signatures if none can write.¹ The majority of jurists restrict this ordinance to testaments made by farmers;² but, according to its true reason, it includes all testaments made in the country.³

3. *Testaments Made during Contagious Disease* (*tempore pestis conditum*).⁴

§ 699. When one desires to make a private testament at a time when a contagious sickness is raging at the place of the intended testamentation, all seven witnesses need not be present at the testamentation at the same time.⁵

C. TESTAMENTS WITH CHANGED FORMALITIES.

§ 700. The usual formalities are changed in testaments in which ascendants institute their descendants as heirs, being in part diminished and in part increased.⁶ Respecting parents and other ascendants—

1. They may by observing the ordinary testamentary forms testamentate in writing as well as orally, and in such testaments may institute as heirs not only their descendants but other persons (*extranei*), or may leave them something.

2. But if they desire to testamentate in writing and to institute as heirs only such descendants as without such institution would have been called to the intestate inheritance succession, then they need no witnesses thereto, and it is immaterial whether they write the testament themselves or whether it be written by another; however, it is necessary that the date of testamentation be inserted⁷ and that at least the names of the instituted heirs be written by the testator, and that if the inheritance share of each be fixed, it

¹ However, the witnesses who do not sign must have the contents of the testament communicated to them: Const. 31. C. 6. 23; Glück, Comm. Vol. 42, § 1484.

² Thibaut, System, § 710; Schweppé, Pand. § 821.

³ Glück, Vol. 42, p. 257.

⁴ By the canon law there is a fourth division, to wit, the *testamentum ad pias causas*. Every disposition by last will, be it by testament or by codicil, so far as it is for the benefit of the church or another *pia causa*, is valid, even if not more than two witnesses were present: Cap. 11. X. 3. 26. See Const. 13. C. 1. 2; Glück, Vol. 42, § 1479.

⁵ Const. 8. C. 6. 23. of Diocletian and Maximian. See Glück, Vol. 42, § 1485.

⁶ Novel 107; Euler, De testamento et divisione parentum inter liberos, Berlin, 1820; C. G. Müller, Diss. de testamento parentum inter liberos privilegiato, Leipzig, 1826; Glück, Comm. Vol. 42, § 1480-1483.

⁷ It is disputed whether this must be written by the testator himself and whether it must be written in the beginning of the testament. The majority sustain the former, but not the latter. See Glück, Comm. Vol. 42, p. 192.

should be written by the testator himself in words and not in figures only. This is termed the testament of parents in favor of children (*testamentum parentum inter liberos*).²

3. The simple division of parents among children (*divisio parentum inter liberos*) differs from the foregoing testament when the ascendants merely designate the property which shall fall to each descendant called to the inheritance. Such division is valid if subscribed by the ascendants making it, or their children whom it affects.³

SIMULTANEOUS AND RECIPROCAL TESTAMENTS.⁴

§ 701. Two persons cannot testamentate in one instrument (*testamentum simultaneum*), even if they institute each other as heirs by directing that the survivor shall inherit to the other (*testamentum reciprocum*). A testament in common of this kind is only permitted to those who are authorized to testamentate as military.⁵

TITLE THIRD.

I. OF THE CONTENTS OF TESTAMENTS.

§ 702. The essential contents of a testament consist in the institution of direct heir (*heredis institutio*).⁶ This is so necessary that if there be no institution, or but an imperfect one, the disposition by last will cannot stand as a testament.⁷ The institution of an heir may be made only in a testament, and not in a codicil.⁸

¹ Novel 107. cap. 1. If the ascendant cannot write, then he may testamentate only in favor of children with the observance of the usual formalities.

² It is questionable whether an intended testament which is sustained by the rule of Novel 107. is sustained as a testament or only as a codicil. See *Glück* Comm. Vol. 42, p. 203, *seq.*

³ Novel 18. c. 7; Novel 107. c. 3; *Glück*, Vol. 42, § 1483.

⁴ *Glück*, Comm. Vol. 35, p. 50, *seq.*; Vol. 38, p. 214, *seq.*; *Stryk*, De testamentis conjugum reciproci, Halle, 1702; *Deiters*, De dispositionib. hereditariis simultaneous, Bonn, 1837; *Hartmann*, Zur L. v. den Erbvertrag u. gemeinschaftliche Testamenten, Brunswick, 1860, p. 87.

⁵ Const. 19. C. 2. 3. In the occidental empire Valentinian III. (Nov. Valentiniani 63) permitted other persons to institute each other as heirs in a testament *principi oblatum* common to them both, but this ordinance was not inserted in Justinian's code: *Glück*, Vol. 35, p. 64; Vol. 38, p. 214. A particular kind of reciprocal testaments are the correlative testaments, which are when each of the testators makes the validity of his testament either expressly or impliedly depend on the condition that neither will change his: *Boettger*, Diss. de natura et indole testamenti correlative, Marburg, 1795; *Bolley*, Beitr. zur Lehre von den corresp. Testam. der Ehegatten, Stuttgart, 1846.

⁶ § 34. I. 2. 20; Const. 14. C. 6. 23.

⁷ fr. 1. § 3. D. 28. 6.

⁸ § 2. I. 2. 25; fr. 2. § 4. fr. 10. D. 29. 7; Const. 2. 7. C. 6. 36. But if the heir be instituted in the testament, the name of the heir may be announced in the codicil: fr. 77. D. 28. 5. See 4th note to § 755, *infra*.

A. OF THE CAPABILITY OF INSTITUTED HEIRS.¹

§ 703. They whom the testator institutes as direct heirs must be capable of being so instituted (*quocum testamenti factio est*).² They who are incapable of being called to an inheritance or appointed legatees (§ 662, *supra*) cannot be named as heirs in a testament. Besides those the following cannot be instituted: non-Romans,³ slaves of non-Romans,⁴ children who at the death of the testator were not yet conceived,⁵ and corporations excepting to be instituted as heirs has been granted to them as a special privilege.⁶

¹ Ulpian, XXII. § 1-13; Inst. 2. 14; Dig. 28. 5; Cod. 6. 24. and 25; *Donellus*, Comm. jur. civ. Lib. 6, c. 17; *Roszhirt*, Erbrecht, § 7; *Glück*, Comm. Vol. 39, §§ 1438, 1438 a; Vol. 40, § 1438 b.

² § 4. I. 2. 19. The moderns term this passive testamentability (§ 685, *supra*, note 2). It cannot be said of every one who has it that he can inherit: *W. Müller*, Die Natur der Schenkung auf den Todesfall, Gieszen, 1827, p. 82; *Glück*, Comm. Vol. 38, p. 360, *seq.*; Vol. 39, pp 117, 158, *seq.* See § 738, *infra*. The soldier, however, who testamentates *jure militari*, may institute an incapable person as heir: fr. 13. § 2. D. 29. 1; Const. 5. C. 6. 21.

³ fr. 6. § 2. D. 28. 5; Const. 1. C. 6. 24.

⁴ fr. 3. D. 34. 8. If one institute his own slave as his heir, then the slave is compelled to become the heir of his master (*heres necessarius*). Formerly he had to be expressly manumitted in the testament to render the institution valid; but by the Justinian law the manumission lies in the institution as heir: *Gaius*, II. § 153-155; Ulpian, XXII. § 7-13; pr. § 1. I. 2. 14; § 1. I. 2. 19; Const. 1. C. 6. 27. See § 733, *infra*. If another's slave were instituted as heir, then it depended on his master whether he would acquire the inheritance through the slave: § 1. I. 2. 14; Ulpian, XXII. § 9.

⁵ fr. 3. D. 37. 11. This limitation is not applicable to the *fideicommissum hereditatis* nor to indirect dispositions by last will, such as family *fideicommissa*: fr. 32. § 6. in fin. D. 31; *Glück*, Vol. 39, p. 406, *seq.* For other cases in which the institution of after-born children is invalid, see § 28. I. 2. 20; fr. 9. §§ 1. 3. D. 28. 2. See also note 6.

⁶ Const. 8. C. 6. 24. Legacies may be left to them without requiring special permission therefor: fr. 20. D. 34. 5. By the ancient Roman law uncertain persons may neither be instituted as heirs nor have a legacy given to them: *Gaius*, II. §§ 238. 242. 287; Ulpian, XXII. § 4; XXIV. § 18; § 25. I. 2. 20. By a *senatusconsultum* under Hadrian this was extended to *fideicommissa*: *Gaius*, II. § 287; Ulpian, XXV. § 13; § 25. I. 2. 20. But this was gradually abolished, excepting in the cases specified, by different prescripts, of which the most modern is Justinian's Const. un. C. de incert. pers. (6. 48). (But see § 25-28. I. 2. 20.) The following were regarded as uncertain persons:

1. Individuals who are not designated, but are to be fixed by the occurrence of a future event specified in the testament, such as "he who shall first come to my funeral" (*qui primus ad funus meum venerit*). But by Justinian's Const. 49. C. 1. 3. legacies may be given to the poor and to prisoners without a more precise designation (see Valentinian's Const. 24. and Leo's Const. 28. C. 1. 3); and in the Const. un. C. 6. 48. this first rule is abolished: § 25. I. 2. 20.

2. The *posthumi*. In consequence of the right of the indefeasible heirs, it gradually came to pass, partly before and partly under the heathen emperors, by means of

There are also persons who cannot be instituted as heirs in a testament in certain circumstances, or by certain other persons. These are¹—

1. The regent, on condition that he continue a litigation of the testator against a private person.²

2. The second husband or wife cannot be instituted for a greater amount than is received by that child of the first marriage who is to receive the least (§ 581, *supra*).

3. The widow who marries during her year of mourning cannot institute her second husband to more than one third of her estate (§ 582, *supra*).

4. The father, if he have legitimate descendants, may institute his concubine children and their mother to only one twelfth of his estate, and the concubine alone to only one twenty-fourth.³ The capability of the instituted heir must exist at the time of the making of the testament and at the time that the inheritance devolves on him or her, and must continue uninterruptedly from this period till the entering into the inheritance.⁴

B. PRECISE DESIGNATION OF THE HEIR.

§ 704. The heir's person must be precisely designated; hence the heir must be either named or so described that no doubt can exist respecting his individuality.⁵ Subject to this condition, it matters not whether the name

the statutory prescripts and of the doctrine that *posthumi sui*, that is, here, all those who first came into the relation of *sui heredes* after the making of the testament, might have legacies given to them; and the prætor gave the instituted *posthumi alieni* at least the *bonorum possessio* according to the testament, excepting in the cases mentioned in note 1, *infra*: Gaius, I. § 147; II. § 242; pr. I. 2. 10; fr. 6. D. 5. 2; fr. 25. § 1. D. 28. 2. The *posthumi alieni* (such as the children of the testator's emancipated sons born after the testator's death) were always excluded from legacies: § 26. I. 2. 20. By the Const. un. C. 6. 48, besides the exceptions specified, they may be instituted by the civil law and may receive legacies: § 26. I. 2. 20.

3. Legal persons. But by Constantine's Const. 1. C. 1. 2. the church generally was excepted, as also all congregations by Leo's Const. 12. C. 6. 24. (By *senatus-consulta* and ordinances of heathen emperors, the passive testamentability was given to several heathen temples: Ulpian, XXII. § 6.) On earlier exceptions as to congregations, see Ulpian, XXII. § 5; XXIV. § 28; fr. 20. D. 36. 1; fr. 1. § 1. D. 38. 3; fr. 73. D. 30; C. Rau, *Historia juris civilis de personis incertis*, etc., Leipsic, 1784; Glück, *Comm.* Vol. 39, pp. 400 and 551, *seq.*

¹ On the former conditional incapability of females by the *lex Voconia* of the year of the city 585, see Savigny, *Verm. Schriften*, Vol. 1, No. 14; Glück, *Comm.* Vol. 39, p. 281, *seq.*; Giraud, *Loi Voconia*, Paris, 1841.

² fr. 91. D. 28. 5; § 8. I. 2. 17.

³ Novel 89. c. 12.

⁴ § 4. I. 2. 19. See fr. 49. § 1. fr. 59. § 4. fr. 62. pr. D. 28. 5; fr. 210. D. 50. 17; *Lehr*, *Erörterung der Frage, in welchen Zeitpunkten der Testamentserbe oder Legatar erbfähig sein müsse?* Darmstadt, 1792. On the institution as heirs of a foundation not yet existing, see § 157, *supra*, note 6; Glück, *Comm.* Vol. 40, § 1438 b.

⁵ § 29. I. 2. 20; fr. 9. pr. § 8. fr. 62. § 1. D. 28. 5; Paul, III. 4. B. § 3; *Conrad*, *De voluntate testatoris dubia*, Helmstadt, 1736. But in the testaments of the blind both of these must concur: Const. 8. C. 6. 22.

be wrongly given or the description do not entirely accord, except in the case of testaments of blind persons.¹

C. CONDITIONS ANNEXED TO THE INSTITUTION OF HEIRS.²

§ 705. The institution of heirs may be—

1. Absolute.

2. Subject to a suspensive, possible and permissible condition,³ in which case the inheritance devolves to the heir only on the performance of the condition.⁴ Every dissolving, substituted⁵ and impossible condition, and every condition contrary to good morals, is regarded as not being annexed,⁶ while every absurd and captatorial (legacy-hunting) condition renders the institution invalid.⁷ The institution of an heir cannot be placed at the absolute will of another, but may depend on the performance of an act by another.⁸

3. The institution of an heir may depend on a designation of time, which, however, is operative only when one is instituted as heir to take effect at an uncertain day (*ex die incerto*), in which case the day, if it be not the day of the death of the instituted heir,⁹ is regarded as a condition;¹⁰ however, on

¹ § 29. I. 2. 20; fr. 48. § 3. fr. 62. § 1. D. 28. 5; Const. 5. 14. C. 6. 24.

² Dig. 28. 7; 35. 1; 34. 6; Cod. 6. 45. and 46; 6. 41; *Donellus*, Comm. jur. civ. Lib. 6, ch. 18. 19.

³ § 9. I. 2. 14; *Glück*, Comm. Vol. 41, § 1457-1465. The institution of an heir may be subject to several conditions, in which case the devolution of the inheritance depends on whether they must be all performed or only one or the other of them: § 11. I. 2. 14. On the time within which the condition must be performed, see *Endemann*, Comm. de implendæ conditionis tempore, Marb. 1821; *Glück*, Vol. 41, § 1463.

⁴ fr. 5. § 2. D. 36. 2. If the act which is the object of the condition be one which the heirs or legatees must avoid committing during their lives, then they may acquire the inheritance or legacy immediately by giving surety against the performance of the act. This is termed *cautio Muciana*: fr. 7. pr. D. 35. 1. See fr. 77. § 1. fr. 79. § 2. fr. 67. fr. 72. pr. fr. 73. fr. 101. § 3. D. 36. 2; *Donellus*, Comm. jur. civ. Lib. 8, c. 33; *Zimmern*, De cautione Muciana, Heidelberg, 1818; *Stübel*, De cautione Muciana, Leipsic, 1824; *Glück*, Vol. 41, § 1464.

⁵ The reason why a dissolving substituted condition in the institution of an heir is invalid lies in the rule, once heir always heir (*semel heres semper heres*): fr. 7. § 10. in fin. D. 4. 4; fr. 88. D. 28. 5. Such a condition is allowed in the testament of a soldier: arg. fr. 15. § 4. fr. 41. pr. D. 29. 1; Const. 8. C. 6. 21.

⁶ But if the non-performance of an unpermissible act, or an act against public morals or propriety, be a condition, it is valid: see *Gaius*, III. § 98; § 10. I. 2. 14; fr. 1. 8. 9. 14. 20. 27. D. 28. 7; fr. 45. D. 28. 5; fr. 6. § 1. D. 35. 1; Const. un. C. 6. 41. For the reason of this deviation from what is permitted in conventions, see § 184, div. 4, *supra*.

⁷ fr. 16. D. 28. 7; fr. 70. 71. pr. D. 28. 5; fr. 64. D. 30; *Brugnen*, Diss. de captatorii institutionibus, Leyden, 1823; *Glück*, Comm. Vol. 40, p. 206, *seq.*

⁸ fr. 32. pr. fr. 68. D. 28. 5. Not to the contrary are fr. 1. pr. D. 31; *Glück*, Comm. Vol. 33, p. 462, *seq.*

⁹ This is similar to the *dies certus*: Const. 9. C. 6. 24.

¹⁰ fr. 75. D. 35. 1. fr. 4. pr. fr. 22. pr. D. 36. 2.

the institution of an heir, to take effect at a certain day (*ex die certo*), or from or to a certain day (*in diem*), generally the time is not regarded as being annexed.¹

4. An heir can likewise be instituted with a statement of the reason which moved the testator thereto, and generally it matters not even if the facts on which the motive rests are untrue.²

5. An heir can likewise be instituted under an obligation that he will apply the inheritance, wholly or partly, to a certain object (*modus*), which obligation the heir must fulfill if he accept the inheritance and it be physically and morally possible, unless the heir is alone interested.³

6. It depends on the testator's volition whether he will institute an heir *sine parte* (for the whole), *ex parte* (for a part), or *ex re certa* (for certain things).⁴

D. OF THE BIRTHRIGHT PORTION.⁵

1. Nature.

§ 706. The testator may generally institute as heirs whom he will. How-

¹ § 9. I. 2. 14; fr. 34. D. 28. 5. In a soldier's testament an institution *ad diem* (for a specified time) is permissible: fr. 15. § 4. fr. 41. pr. D. 29. 1; Const. 8 C. 6. 21.

² fr. 17. § 1. D. 35. 1; fr. 93. § 1. D. 32. To this rule there are, however, two exceptions:

1. When it can be shown that the testator erred, then the institution of the heir is invalid because of the error: fr. 72. § 6. D. 35. 1; Const. 4. C. 6. 24. See Code 6. 44.

2. When the reason (*causa*) is expressed as a condition, where it is to be treated as such, see § 31. I. 2. 20.

³ fr. 17. § 4. D. 35. 1; fr. 71. pr. D. 35. 1. See § 186, *supra*.

⁴ § 4. I. 2. 14. On the division of the inheritance, when the testator has or has not determined each one's portion, see § 5-8. I. 2. 14; fr. 17. § 5. fr. 18. fr. 59. § 2. D. 28. 5; Const. 23. C. 6. 37; *Donellus*, Comm. jur. civ. Lib. 6, c. 20, 22; *Heineccius*, Antiq. Rom. Lib. 2 Tit. 14, § 5, 6; *Glück*, Comm. Vol. 40, § 1439. On the heir for specific things, see fr. 35. D. 28. 5; Const. 13. C. 6. 24; *Glück*, Comm. Vol. 40, p. 169, *seq.*; see *Nenner*, Die heredis institutio ex re certa, Gieszen, 1853.

⁵ Sections 706-718 treat on the regard which the testator must pay to certain intestate heirs and of the consequences which arise from omitting so to do (see note 2).

I. According to the Roman interpretation of the twelve tables the testator was compelled to institute each *suus*, as also the *posthumus suus* (§ 711, *infra*, note 4), either as a direct heir (*heredem institutere*) or expressly exclude him from the inheritance (*exheredare*). When he did neither (*preteritio*) in the case of a *suus* in the narrow sense, then if the preterited were a son, the testament was void from the beginning; if the preterited were a daughter or a grandchild, etc., then a portion of the inheritance would devolve to her or the child in connection with the instituted heir (*scriptis hereditibus accrescit*). At length Justinian rendered the *filius suus* equal to the other *sui* in a limited sense. See Gaius, II. §§ 123. 124. 127. 128. 130-134. 136-143; Ulpian, XXII. 14-22. XXIII. 2. 3; Inst. 2. 13; Dig. 28. 2. 3; Cod. 6. 28. 29.

ever, there are certain persons, nearly related¹ to him, whom he cannot wholly exclude from his inheritance without special cause, but to whom, in the absence of such cause, he must leave a certain portion of his estate, which is termed the birthright portion (*portio s. pars legitima*);² but of the remainder of his property he may dispose as he pleases.³

2. Persons Entitled to the Birthright Portion.⁴

§ 707. The persons entitled to the birthright portion are—

1. The testator's lineal descendants, but only so far as they would have inherited to him *ab intestato* as his proper successors, hence the legitimate and legitimated children of both parents and of the paternal and maternal grandparents may claim the birthright portion; the illegitimate children may claim only from their mother and their maternal grandparents (§ 668, *supra*).⁵ As respects adopted children—

a. Arrogated and fully adopted children may claim the birthright portion from their adopted father,⁶ but whether they have the right to claim their blood father's estate, according to Novel 118, is much disputed.⁷

II. The prætorian edict agrees with these rules, but with certain exceptions. See Gaius, II. §§ 125. 126. 129. 135–137 151; Ulpian, XXIX. 23; XXVIII. 1–5; § 3–7. I. 2. 13. § 3. I. 3. 9. (10); Dig. 17. 4. 5. 8; Cod. 6. 12; Const. 3. 4; Cod. 6. 28.

III. By the decision of the forum of the Centumvirs the rule was formed that when other persons were inofficiously preferred to very near intestate heirs by a valid testament, such testament could be invalidated by means of the *querela inofficiosi testamenti*, so that an intestate inheritance succession arose. See Paul, S. R. 4. 5; Cod. Greg. 2. 8; Inst. 2. 18; Cod. 3. 28.

IV. Justinian in the Novel 115. ch. 3. and 4. ordained that the descendants and ascendants entitled to the birthright portion (the brothers and sisters are not referred to in the Novel) shall be instituted as direct heirs. See particularly *Adolf Schmidt*, Das formelle Recht der Notherben, Leipzig, 1862.

¹ Gaius, III. §§ 40. 41; Ulpian, XXI. § 1; pr. § 1. I. 3. 7. (8); D. 37. 12; Const. 4. C. 6. 4; § 3. I. 3. 7. (8). See *M. S. Mayer*, De hereditate parentis manumissoris, Tübingen, 1832; *Glück*, Comm. Vol. 35, p. 219, *seq.*; Vol. 37, p. 356, *seq.*

² Paul, IV. 5; Cod. Gregor. 2. 8; Inst. 2. 18; Dig. 5. 2; C. 3. 28; Novel 18. c. 1; Novel 115. c. 3. 4; *Donellus*, Comm. jur. civ. Lib. 19, c. 4; *Crolle*, Comm. historico juridica de portione legitima, Bonn, 1820; *Francke*, Das Recht der Notherben, Göttingen, 1831; *Glück*, Comm. Vol. 6, § 543; Vol. 7, § 543–561; Vol. 35, § 1420, 1421, p. 119; Vol. 38, p. 117 (§ 1421–1425); also the works cited in §§ 710, 713.

³ The soldier who testaments *jure militari* (§ 697, *supra*) is not bound by the prescripts respecting the person entitled to the birthright portion or the indefeasible heirs, provided he knew of their existence: § 6. I. 2. 13; Const. 9. 10. C. 6. 21. Compare with Const. 17. C. 6. 21. and Const. 37. C. 3. 28; *Francke*, Das Recht der Notherben, § 35.

⁴ *Francke*, Das Recht der Notherben, § 16; *Glück*, Comm. Vol. 35, p. 140, *seq.*

⁵ pr. § 1. I. 2. 18; fr. 29. §§ 1. 3. D. 5. 2; § 5. I. 2. 13.

⁶ § 4. I. 2. 13; § 2. I. 2. 18; Const. 10. C. 8. 48.

⁷ This right is abolished in the Const. 10. C. 8. 48. See *Glück*, Comm. Vol. 38, p. 180; Vol. 7, p. 11; *Francke*, p. 185.

b. Partially adopted children may claim the birthright portion from their blood father's estate, but not from their adopted father's estate.¹

c. While those adopted by females may also claim the birthright portion from their adopted mother's estate.²

2. In default of descendants, the testator's lineal ascendants, provided that they would have inherited as the proper successors *ab intestato*,³ the brothers and sisters of the whole blood, and the paternal brothers and sisters of the half blood of the testator (*germani* and *consanguinei*), also provided that they would have inherited *ab intestato*, are entitled to the birthright portion. The brothers and sisters, however, are entitled to this portion only when the testator has instituted a *turpis persona* (infamous person).⁴ The brothers and sisters of the half blood by the mother (*uterini*),⁵ and the nephews and nieces, have no right to the birthright portion.⁶

3. *Extent of the Birthright Portion.*

§ 708. The birthright portion is always a part of that share which the one entitled to such portion would have received *ab intestato*.⁷ Formerly, in analogy to the *Lex Falcidia* (§ 771, *infra*), this portion always consisted in a fourth part of the intestate share of the birthright heirs, whatever their number might be.⁸ But subsequently Justinian increased the birthright portion, and ordained that when there are existing four or less of the testator's descendants, the birthright portion should be a third of the intestate share; but when there are existing more than four, it should be one half the intestate share.⁹ Therewith such descendants as succeed *ab intestato in stirpes* are not counted according to polls, but according to stocks, so that those belonging to one stock are reckoned as one person.¹⁰ This ordinance, which origin-

¹ Const. 10. pr. § 1. C. 8. 48. See § 597, *supra*.

² Because in Const. 5. C. 8. 48. they are rendered equal to the children of the blood: Glück, Comm. Vol. 7, p. 373; Vol. 35, p. 183.

³ § 1. I. 2. 18; fr. 1. fr. 15. pr. fr. 30. pr. D. 5. 2.

⁴ See Francke, p. 198; Glück, Comm. Vol. 35, p. 95, *seq.*; Vol. 39, p. 272, note 62.

⁵ Const. 27. C. 3. 28. On the ancient law, see fr. 8. § 5. D. 5. 2; Const. 1. 3. C. Theod. 2. 19. and Const. 21. C. 3. 28. *Contra*, Glück, Comm. Vol. 7, p. 12, *seq.*; Vol. 39, p. 230; Francke, p. 192.

⁶ Of which, according to the ancient law, there is no doubt: § 1. I. 2. 18; fr. 1. D. 5. 2; Const. 21. 27. C. 3. 28. See Roszhirt, Erbrecht, p. 399; Glück, Comm. Vol. 35, p. 230.

⁷ See Francke, § 17; Glück, Comm. Vol. 7, p. 29-60; Vol. 35, p. 236.

⁸ § 6. I. 2. 18; fr. 8. §§ 6. 8. D. 5. 2; Const. 29. C. 3. 28. Hence in the Pandects and Code it was usually termed the *quarta* and sometimes *Falcidia*: Const. 31. C. 3. 28.

⁹ Novel 18. c. 1. Hence the verse:

"Quatuor aut infra natis dant jura trientem
Sed dant remissem liberis, si quinque vel ultra."

¹⁰ This is at least the common opinion: Glück, Comm. Vol. 7, p. 60.

ally treated of descendants only, was extended to ascendants and to brothers and sisters.¹

4. *General Principles of the Birthright Portion.*

*The Mode of Computation.*²

§ 709. The following principles are applicable to the birthright portion and the mode of its computation :

1. To determine its extent regard is had to the estate leaver's property and to the persons according to whose number it is computed, at the time of his death.³

2. The birthright portion is computed of the estate leaver's net property after the deduction of all debts.⁴

3. To determine whether the birthright portion should consist of the half or only a third of the intestate share of the birthright heir, all persons are to be regarded who would have inherited to the testator if he had died intestate; consequently such persons as he has disinherited⁵ or partially adopted, and his poor widow.

4. The birthright portion is a part of the decedent's estate; consequently the birthright heir cannot claim it till after the estate leaver's death.⁶ All that the birthright heir will have left to him by the estate leaver in any manner, be it as an instituted heir or by legacy or by gift, in the event of death (*donatio mortis causa*)⁷ is to be charged to the birthright portion; but a gift in life (*donatio inter vivos*) is only to be charged to such portion when it was expressly given on this condition.⁸

5. He who is liable for the birthright portion cannot so greatly diminish his estate by gifts in life that those entitled to such portion shall be wholly or partially deprived thereof. Such a gift is termed *inofficiosa donatio*, and whether it be such a gift is determined according to the time at which it was made.⁹

6. The birthright portion must be of the substance of the estate left,¹⁰ and

¹ Glück, Comm. Vol. 7, p. 27; Vol. 35, p. 238, *seq.*; Francke, p. 207; Roszhirt, Testam. Erbrecht, Vol. 1, p. 86, *seq.*

² Francke, § 18; Glück, Comm. Vol. 35, p. 276.

³ Const. 6. C. 3. 28.

⁴ fr. 8. § 9. D. 5. 2; fr. 39. § 1. D. 50. 16.

⁵ fr. 8. § 8. D. 5. 2; Francke, p. 212.

⁶ According to the rule: *Hereditas viventis non datur*. See § 651, *supra*.

⁷ fr. 8. § 6. D. 5. 2; Const. 29. 30. pr. C. 3. 28; Francke, § 18.

⁸ fr. 25. pr. D. 5. 2; Const. 35. § 2. C. 3. 28; Const. 20. § 1. C. 6. 20. Besides the *dos* or *propter nuptias donatio* which the birthright heir descendant obtained from his or her ascendant, Const. 29. C. 3. 28, and the purchasable militia which the ascendant procured for him: Const. 20. *cit.*

⁹ See § 469, *supra*, and the works cited in note 3.

¹⁰ Const. 38. § 1. C. 3. 28. If, however, the birthright heir be instituted *in re certa*,

cannot have conditions, designation of time or burdens imposed on it;¹ and if such be added, they are disregarded.²

E. OF THE INDEFEASIBLE HEIRS.¹

1. *Who are such Heirs.*

§ 710. By the term indefeasible heirs are generally understood all those persons whom a testator must necessarily regard, and in this wide sense every one entitled to the birthright portion is an indefeasible heir. But respecting the kin entitled to the birthright portion there is an important distinction. By the Novel 115. the descendants and ascendants must be either formally instituted as heirs or formally excluded from the entire inheritance.¹ Even if they are only to receive the birthright portion they must in every case be instituted. But if they be instituted, then the amount of the birthright portion may be left to them in any other way, *e. g.*, by legacy.² For the reason that the estate-leaver's descendants and ascendants must be either formally instituted or formally excluded, they are now termed indefeasible heirs in the narrow sense.⁴ But if an infamous person be instituted, then

he cannot require the division of the entire estate, but only that the things bequeathed to him be appraised, and if their value be insufficient, that the deficiency be compensated.

¹ Const. 32. Const. 33. pr. C. 3. 28; Novel 1. c. 38. However, a burden may be imposed on the birthright heir, if, for the burden, a *commodum* (advantage), in addition to his birthright portion, be bequeathed to him on the express condition that he shall not have the advantage if he do not suffer the burden. This is termed the *Cautela Socini* of Marianus Socinus the younger, an Italian jurist, who died in the year 1556; he first declared it valid in an opinion on a testament which contained it: *Koch*, Über die Socinische Cautel, Gieszen, 1786; *Glück*, Comm. Vol. 7, p. 86, *seq.*; Vol. 35, p. 334, *seq.*; *Francke*, p. 247.

² Const. 12. C. 3. 28. has an exception to this.

³ Ulpian, XX. § 14-20; Gaius, II. §§ 123. 124. 127. 128. 130-134. 136-143; Inst. 2. 13; Dig. 28. 2; Cod. 6. 28. 29. For the modern law, see Novel 115. c. 3-5; *Donellus*, Comm. jur. civ. Lib. cap. 13-15; *Noodt*, De liberorum exheredatione et præteritione, Leyden, 1692; *Heise*, Diss de successoribus necessariis, Göttingen, 1802; *Fürster*, Diss de bonorum possessione liberorum præteritorum contra tabulas parentum, Breslau, 1823; *Uhrig*, über die Wirkung der B. P. contra tabulas, Würzburg, 1844; *A. Schmidt*, Das formelle Recht der Notherben, Leipzig, 1862; *Francke*, das Recht der Notherben, § 1-14; *Glück*, Vol. 36, p. 139; Vol. 38, p. 17 (§ 1421 h; 1425 f); Vol. 39, § 1432.

⁴ Novel 115. c. 3. pr. On the wide sense in which Mackeldey here uses the expression formally excluded, see § 711, *infra*. Already by the ancient law certain descendants had to be instituted or disinherited. See 706, *supra*, note 5, Div. I. and § 711, *infra*. Long before Novel 115. there were indefeasible heirs in the narrow sense.

⁵ Const. 30. pr. § 1. C. 3. 28. Comp. with Novel 115. c. 3. pr.; *Stein*, Von pflichtwidr. Testam. § 52, p. 228; *Francke*, § 19; *Glück*, Comm. Vol. 35, § 1421 d.

⁶ The moderns also term them *heredes necessarij*, but this term in this relation is not correct and not in accordance with the sources; as *heres necessarius* in the

the brothers and sisters are entitled to the birthright portion, but they need be neither formally instituted nor excluded;¹ but it suffices if in such an event the birthright portion be left to them in any other way. They are therefore not indefeasible heirs in the narrow sense,² in which sense only the term indefeasible heir will hereafter be used.

2. *Modes by which the Indefeasible Heirs may be Deprived of the Inheritance.*

§ 711. The indefeasible heirs must be either formally instituted or formally excluded from the entire inheritance. The exclusion from the entire inheritance, or disinherison, is either an *exhereditio* (disherison) or a *præteritio* (omission, passing over). By *exhereditio* is meant the express declaration of the estate leaver that an indefeasible heir shall be *exheres*. It may be made in a testament only, and, like the institution of an indefeasible heir, admits of no conditions,³ and the exclusion must always be from the entire inheritance and from every degree of heir (*ab omnibus hereditibus* and *ab omni gradu*).⁴ He who is not formally instituted or disinherited is termed *præteritus* (omitted or passed over).⁵ The father and the paternal grandfather must always disinherit the *sui* (blood child),⁶ as well as the *emancipati*, if they do not institute them;⁷ while, on the contrary, other descendants, as

Roman law is such an heir that if the inheritance is conferred on him for any reason he must necessarily become the heir. See §§ 732, 733, *infra*.

¹ For Justinian in relation to the brothers and sisters did not change the ancient law by which the birthright portion could always be left after death in any way: § ult. I. 2. 18; Novel 18. c. 1.

² The poor widow does not belong to the indefeasible heirs, that is, she need not be instituted to her proper portion, though she cannot be deprived thereof by her husband. See § 679, Div. 2, *supra*.

³ fr. 3. § 1. D. 28. 2; fr. 18. D. 37. 4; fr. 68. in fin. D. 28. 5; fr. 15. D. 28. 7. However, a *sui* (heir) may be disinherited conditionally that in the event that the condition does not arise he shall be instituted, because then in no event is he preterited should the condition arise or not: fr. 86. D. 28. 5; Const. 4. C. 6. 25.

⁴ fr. 3. § 2-4. D. 28. 2; *Francke*, § 6.

⁵ § 12. I. 3. 1.

⁶ On the nature of *sui heres* (blood child), see *Griessinger*, *Geschichte und neue Theorie der Suitat*, Stuttgart, 1807; *Francke*, §§ 2, 3; *Glück*, *Comm.* Vol. 36, p. 139; *Schmidt*, p. 5, note 8, comp. with pp. 3, 4. *Sui heredes*, in relation to institution and disinherison, are only those who at the time of the making of the testament were in the immediate paternal power of the testator (*sui heredes* in the narrow sense) and those who afterwards come into the immediate paternal power of the testator, or would have come had the testator survived their birth (*posthumi sui*). See § 664, *supra*. In relation to the necessary acquisition of the inheritance the notion is more comprehensive. See § 733, note 3, p. 546, *infra*.

⁷ And other descendants who when it came to intestate succession would have been called to the *bonorum possessio ex ed. unde liberi*.

well as ascendants, may be passed over or omitted (*preterited*).¹ But by Justinian's later prescript an *exheredatio* and a *preteritio* are invariably permitted only for a just cause, which must be stated in the testament.²

3. *Causes for which the Indefeasible Heirs may be Deprived of the Inheritance.*

§ 712. A. The causes for which descendants may be disinherited or preterited by their ascendants³ are—

1. If they maliciously attack their ascendants.
2. If they injure them in a severe or improper manner.
3. If they prefer a complaint against them for an offence which was not a public offence.
4. If they consort with poison-mixers or sorcerers and engage in their occupations.
5. If they seek the lives of their ascendants with poison or otherwise.
6. If the son copulate with his stepmother or his father's concubine; this also includes the case when the grandchild copulates with his step-grandmother, but not the case when the daughter copulates with her stepfather.
7. If the son falsely accuse his parents and thereby cause them a great loss of property.
8. If the son or grandson be requested by his father, or by that grandfather to whom the son or grandson would inherit should the father or grandfather now die intestate, to become his surety for his release from the debtor's prison, and which the son or grandson refuses, though he may have the ability therefor.
9. If the descendant prevent his ascendant from making a testament.⁴
10. If the son, contrary to his parents' will, consort with *arenarii* (gladiators) and *mimi* (actors), and, notwithstanding his parents' objections, continue with them; provided, however, that the parents pursue not the same occupation.
11. If the daughter or granddaughter lead a dissolute life; unless she had no opportunity for a proper marriage or her parents prevented such marriage, though she had attained her majority.⁵
12. If the children did not protect their insane ascendants.

¹ See the source citations in § 706, *supra*, note 5, Div. I. II.

² Novel 115. c. 3-5; *Weichsel*, Diss. de præteritione justa adjecta causa, Giessen, 1797.

³ Novel 115. c. 3; *Francke*, § 32; *Glück*, Comm. Vol. 37, §§ 1424 and 1425.

⁴ Should the parents in this case die without having disinherited the child, then such child is excluded from the inheritance as unworthy. See § 738, *infra*.

⁵ A marriage against the will or without the parents' knowledge is also cause for disinheritance, excepting if the circumstances be such that the female descendant, even if she led a dissolute life, could not be disinherited and she marries a freeman: *Glück*, Comm. Vol. 37, p. 161, *seq.*

13. If the children did not purchase their ascendants' release when prisoners of war.¹

14. If the descendants of orthodox parents connect themselves with an heretical religious sect.

B. The ascendants may be disinherited or preterited by their descendants for the following causes:²

1. If the ascendants deliver their descendants to the official authorities for an offence whose penalty is death; unless the offence were committed against the state or regent.

2. If they seek the lives of their descendants with poison or sorcery, or otherwise.

3. If the father copulate with the wife or concubine of his family son.³

4. If the parents prevent their children from disposing by testament of things of which they may testamentate.

5. If the ascendant seek to destroy the understanding of his or her marriage partner by poison, or otherwise to destroy his or her life.

6. If the children or one of them become insane, and the parents do not care for them or it.

7. If the child be imprisoned, and the parents do not strive to release it.

8. If the parents of an orthodox child are heretics.

Offences other than these do not authorize disinherison or preterition.⁴ Whether a reconciliation has the effect of nullifying either of the foregoing causes is doubted, but according to general principles it has.⁵

F. CONSEQUENCES OF AN ILLEGAL EXCLUSION.⁶

1. *In General.*

§ 713. When a testator has not observed all the provisions of the law in relation to his indefeasible heirs and birthright portionees, then the following cases arise:

I. If the indefeasible heirs be instituted, then they cannot contest the testament, even if the whole of the birthright portion had not been left to them, because in this event they have an action only for supplying the

¹ Provided that the child to be disinherited was at the time of the commission of the offence aged at least eighteen years: Novel 115. c. 3. § 13; *Glück*, Vol. 37, p. 165.

² Novel 115. c. 4.

³ What is said respecting concubines is not applicable to the mistresses of the present day.

⁴ *Glück*, Vol. 37, p. 176, *seq.* See *Schmidt*, *Das formelle Recht*, p. 163.

⁵ *arg.* § 12. I. 4. 4; *fr.* 11. § 1. D. 47. 10; *Glück*, *Comm.* Vol. 7, p. 217; *Francke*, p. 414.

⁶ See the works cited § 706, note 2, and § 710, note 1, *supra*; *Stein*, *Über die Lehre des Rom. Rechts von pflichtwidrigen Testamenten*, Erlangen, 1798; *Koch*, *Bonorum possessio*, Giessen, 1799, p. 134, *seq.*; *Schweppe*, *Diss. de querela inofficiosi testamenti*, Göttingen, 1803; *Francke*, § 27-31. See notes 2, 3, 4, p. 533.

deficiency.¹ The same rule applies to the brothers and sisters, if only a part of the birthright portion be left to them in anywise (§ 710, *supra*).²

II. In the case when the indefeasible heirs and the birthright portionees are not instituted, the law previous to Novel 115. differs from the law of this Novel.

A. By the previous law—

1. *Sui* (blood children) preterited by their father or paternal grandfather might contest by the civil law the testament as null, if at the time of making the testament they were already *sui*; or as *ruptum* (post-invalid), if they became so afterwards (*postumi*);³ the preterited *emancipati* might demand the possession of the estate against the testament (*bonorum possessio contra tabulas*), which was also given to the preterited *sui* and to those heirs who could not be preterited (*commisso per alium relicto*), and also to certain instituted *suis* and *emancipatis*.⁴ This was also the rule when legacies were left to the preterited heirs.

2. When, however, children, whether *sui* or *emancipati*, were formally disinherited by their father or paternal grandfather, then they were entitled to the *querela inofficiosi testamenti*, if they could show that they were wrongfully disinherited.⁵ This rule did not apply when their birthright portion was in whole or as a legacy in part bequeathed to them. By an earlier ordinance of Justinian they were restricted, in the latter case, to the action *ad supplendam legitimam*.⁶

3. Against the testament of any of the other ascendants, *e. g.*, the mother's, as well as against that of any of the descendants, one disinherited or preterited had only the same legal remedy as the formally disinherited *suis* or *emancipatus* had.⁷

4. The like remedy was against the testament of any of the brothers or sisters, when the testator instituted an infamous person without leaving his brothers or sisters the birthright portion.⁸ By the ancient law the effect of the *querela nullitatis* was that in general the whole testament became invalid, while in the *bonorum possessio* against the testament and in the *querela inofficiosi testamenti* often some of the testament was sustained.⁹

¹ § 3. I. 2. 18; Const. 30. pr. Const. 35. § 2. Const. 36. C. 3. 28; Novel 115. c. 5. pr.; Glück, Comm. Vol. 7, p. 147; Vol. 36, § 1421 f; Schleinitz, Comm. de actione qua ad supplendam legitimam agitur, Göttingen, 1819; Francke, §§ 25, 26.

² Heineken, Diss. de parentibus et fratribus, etc., Helmstadt, 1762.

³ Ulpian, XXII. § 14, seq.; Gaius, II. § 123; pr. § 1. I. 2. 13; fr. 30. D. 28. 2; Const. 4. C. 6. 28.

⁴ Ulpian, XXII. § 23; XXVIII. § 2-4; Gaius, II. § 135; § 3-7. I. 2. 13; Dig. 37. 4.

⁵ fr. 1-3. D. 5. 2; fr. 10. § 5. D. 37. 4; fr. 6. § 2. fr. 7. fr. 8. pr. D. 5. 2.

⁶ Const. 30. 31. C. 3. 28.

⁷ § 7. I. 2. 13; § 2. I. 2. 18; Const. 17. 28. C. 3. 28.

⁸ Const. 27. C. 3. 28.

⁹ Ulpian, XXII. § 16. 18; § 1. I. 2. 17; fr. 10. § 2. D. 37. 5; fr. 8. § 16. fr. 28. D. 5. 2; fr. 7. D. 28. 2.

B. The modern law or the Novel 115. c. 3-5

1. Has not changed aught in regard to brothers and sisters; these have the ancient *querela inofficiosi testamenti* with its ancient effect.

2. In regard to parents and children Justinian prescribed that they should always institute each other, and that a total exclusion shall be permitted only for one of the causes especially designated in the Novel, and which cause is mentioned in the testament.¹ If this new ordinance of Justinian's be violated because no reason, or no legal reason, or a legal though false reason, be given, then the institution of an heir is invalid, while the remaining provisions in the testament, especially the legacies, retain their validity. Respecting the legal remedies three different modes are maintained by jurists:

a. By the pure nullity system the testament may always be contested by a *querela nullitatis ex jure novo*, or, as it is better expressed, by the usual *hereditatis petitio ab intestato*.²

b. By the inofficious system the testament may always be contested by the *querela inofficiosi testamenti*.³

c. By a mixed system, when no reason or no legal reason is given, the testament may be contested as being null; but when the legal reason alleged is untrue, then the testament may be contested as being inofficious.⁴ Of these three systems, at present that of the pure nullity has the most supporters,⁵ but in the present practice the mixed system is most followed.⁶

2. Of the *Plaint of Inofficious Testament* (*querela inofficiosi testamenti*).⁷

a. By whom it may be Instituted.

§ 714. The *querela inofficiosi testamenti* is

1. Primarily for those descendants of the estate leaver who are birthright portionees. If there be no descendants, or if the descendants cannot or will not institute the plaint, then such plaint is for

¹ *Francke*, §§ 27, 30.

² *Martinus et Azo* in glossa ad L. 5. D. de inoff. testam. et ad Authent. coll. 8. tit. 16. c. 3; *Schneidt*, De *querela inoff. test. inter parentes et liberos exule*, Wirceburg, 1778; *Francke*, § 29; *Glück*, Comm. Vol. 37, p. 245, seq.; *Schmidt*, p. 172, seq.

³ *Cujas*, Ad Nov. 18. and Comm. in L. 3. de liberis et postum.; *Donellus*, Comm. jur. civ. Lib. 6, c. 13; *Duarenus*, Comm. ad tit. Dig. de inoff. test. c. 3, in his works, p. 174; *Voet*, Comm. ad Pand. Lib. 5, tit. 2, § 23; *Koch*, Bonor. possessio, p. 140; *Glück*, Comm. Vol. 7, p. 347.

⁴ *J. Bassanius et Accursius*, in glossa, note 2, *supra*; *Haubold*, Diss. de differentiis inter testam., Leipsic, 1784.

⁵ See also note 2. Mackeldey preferred the inofficious system; he rested on Julian Epitome, Novel 115, and on the terms "*reociso*" and "*evacuato testamento*."

⁶ On the different views and systems, see *Koch*, Bonorum poss., § 131-164; *Glück*, Comm. Vol. 7, p. 335-351; Vol. 37, p. 245.

⁷ See the works cited in § 706, note 2, p. 525, § 710, note 1, § 713, note 6, *supra*; *Donellus*, Comm. jur. civ. Lib. 19, c. 3-10; *Hartitzsch*, Erbrecht, § 128-134; *Francke*, § 20-24.

2. Those ascendants who are birthright portionees, and if an infamous person be instituted, then such plaint is for the testator's brothers and sisters, namely, the *germanis* and *consanguineis*. When, in any case, several persons are entitled to institute the plaint at the same time, and one of these will not institute it or omits so to do, then his interest accrues to the others;¹ and when they who are primarily entitled jointly will not or cannot institute the plaint, then it vests in the next entitled.²

b. *Against whom the Plaint of Inofficious Testament may be Instituted.*

§ 715. The plaint must be brought against the heirs instituted by the testament.³ If it be brought by descendants or ascendants,⁴ then all the heirs, whoever they be, are made defendants;⁵ and in the event that the complainant denies the existence of the causes assigned for disinherison, then by the modern law such defendants must prove it.⁶ A plaint brought by brothers and sisters may be only against that heir who is an infamous person. In this case the complainant must prove the turpitude of the defendant and that he was preterited without cause.⁷

c. *The Object of the Plaint.*

§ 716. The object of the plaint is the rescission of the testament and the restitution of the inheritance. If the complainant be the only intestate heir, then the plaint is for the entire inheritance, otherwise only for the portion which he would have received *ab intestato*,⁸ unless there is a *jus accrescendi* (§ 714, *supra*).⁹ The brothers and sisters also can sue only the instituted infamous person for their intestate portion, and when a reputable person and an infamous person are instituted, then the plaint may be brought by them only for what the latter is to have by the testament.¹⁰

¹ fr. 16. pr. fr. 17. pr. fr. 23. § 2. D. 5. 2.

² According to the principles of § 671, Div. 3, *supra*, see fr. 1. § 7. D. 38. 8; fr. 31. pr. fr. 14. D. 5. 2; Const. 24. C. 3. 28; Glück, Comm. Vol. 7, p. 380, *seq.*

³ The plaint, however, is suspended till they enter into the inheritance: fr. 8. § 10. D. 5. 2.

⁴ Namely, according to the pure inofficious system or according to the mixed system.

⁵ fr. 8. § 2. D. 5. 2. It may also be brought against every one who takes the place of the heir: Const. 1. 10. C. 3. 28.

⁶ Novel 115. c. 3. § 14. in fin. See c. 4. § 9. Ib.

⁷ fr. 3. 5. D. 5. 2; Const. 27. C. 3. 28. See Const. 22. 30. pr. Const. 34. C. 3. 28; Const. 10. C. 5. 9; *contra*, Francke, p. 293, *seq.*; but see Glück, Vol. 37, p. 123, *seq.*

⁸ fr. 8. § 8. fr. 19. fr. 23. § 3. D. 5. 2.

⁹ fr. 17. pr. fr. 23. § 2. D. 5. 2.

¹⁰ Const. 3. C. Th. 3. 19; Const. 27. C. 3. 28; Francke, Notherbenrecht, p. 268.

d. *Effect of the Plaint.*¹

§ 717. A. If the plaint be successful, it has the following effect :

1. If the plaint were instituted by descendants or ascendants, which is the plaint of the modern law (§§ 713, 714, *supra*), then the testament as respects the institution of heirs is wholly invalid when the complainant obtains a decree for its total rescission ; and it is partly invalid when such decree is for its partial rescission (§ 716, *supra*), while all the other testamentary dispositions, such as legacies and *fideicommissa*, remain valid.² If the institution of the heir be wholly invalidated,

a. Then the pure intestate inheritance succession takes place, and the intestate heirs who had no right to a plaint also participate in the success.³

b. But if on the other hand the institution of the heirs be only partly invalidated, then a mixed inheritance succession takes place, namely, it is intestate as to the portion which the complainant receives and it is testamentary as to the portion which remains to the instituted heirs. Each contributes to the debts and legacies in proportion to his share.⁴

2. If the plaint be instituted by the brothers and sisters, which is the plaint of the ancient law (§ 713, *supra*), then if only an infamous person be instituted and his institution as heir be wholly invalidated, the entire testament becomes invalid and the pure inheritance succession takes place, and thereupon they who had no right to a plaint also participate. But if the institution of the infamous person be not wholly invalidated, then a mixed inheritance succession takes place and the legacies remain partly valid. Such is the case when a reputable person and an infamous person are instituted, and the institution of the latter is wholly or partly invalidated according to the amount of the complainant's intestate portion, while the institution of the former remains valid, and the legacies imposed on him are sustained.⁵

B. If the plaint be unsuccessful, then the testament retains its validity, and generally the complainant is punished by the loss of all that was designed for him in the testament.⁶

e. *Of the Peculiarities and Cessation of the Plaint.*

§ 718. (Of the plaint of inofficious testament there is yet to be remarked—

1. That it is only permitted when the complainant has no other legal remedy.⁷

¹ *Sten*, Von pflichtw. Testam. § 36–39; *Glück*, Comm. Vol. 7, p. 442, *seq.*

² Novel 115. c. 3. § 14. in fin. See c. 4. § 9. *Ibid.*

³ Novel 115. c. 3. § 14. in fin. But should it appear that the complainant was not the next intestate heir, then his triumph would be fruitless : fr. 6. § 1. D. 5. 2.

⁴ fr. 15. § 2. fr. 16. pr. fr. 19. fr. 25. § 1. D. 5. 2.

⁵ *arg.* fr. 15. § 2. fr. 24. D. 5. 2 ; Const. 13. C. 3. 28.

⁶ fr. 8. § 14. D. 5. 2. See § 738, note 6, *infra*.

⁷ § 2. I. 2. 18 ; *Glück*, Comm. Vol. 35, p. 358, note 37.

2. That it must be instituted within five years from the time when the testamentary heirs entered into the inheritance.¹

3. It is transmitted to the heirs of him who is entitled to institute it only when he had made preparations in his life for its institution, or if he die, leaving descendants, while the testamentary heir deliberates.²

4. It cannot be instituted against the testament of a soldier made in the field, provided he knew that he either had or might expect to have indefeasible heirs;³ nor can it be instituted against the testament of a family son disposing of his *castrense peculium*, so long as the testator is a family son, nor against the testament by which a family son disposes of his *quasi castrense peculium*, unless the testator be an ecclesiastic;⁴ nor can it be instituted against a father's pupillary substitution,⁵ nor against an *exheredatio, quæ bona mente fit*, that is, when one excludes his indefeasible heir with a view of benefiting him.⁶

II. OTHER TESTAMENTARY OBJECTS.

§ 719. Besides the institution of direct heirs and the proper regard for indefeasible heirs, both of which are essential in a testament, it may contain many other dispositions, such as substitutions, legacies, *fideicommissa*, nomination of tutors and manumissions, all of which depend on the volition of the testator. The testamentary tutorship has been treated of in §§ 622, 623, and manumissions in § 132, *infra*, and legacies and *fideicommissa* will be treated of in the doctrine of codicils, as legacies and *fideicommissa* can be as effectually created by codicil as by testament (§ 755, *seq.*, *infra*). There yet remains to be considered the substitution of direct heirs, which, like their institution, can only be made by testament.

A. VULGAR SUBSTITUTION.

§ 720. The several substitutions which occur in the Roman law cannot be comprehended in a general idea; therefore, each must be considered separately.

The vulgar substitution (*vulgaris substitutio*)⁷ is the nomination of an

¹ fr. 8. § 17. fr. 9. D. 5. 2; Const. 34. 36. § 2. C. 3. 28; Const. 2. C. 2. 41; *Unterholzner*, Verjährungslehre, Vol. 2, § 169–171; *Francke*, p. 313, *seq.*; *Glück*, Vol. 35, p. 441, *seq.*

² fr. 6. § 2. fr. 7. D. 5. 2; Const. 5. 34. C. 3. 28.

³ § 6. I. 2. 13; Const. 9. C. 3. 28; Const. 9. 10. C. 6. 21. comp. with Const. 17. C. 6. 21.

⁴ Const. 37. C. 8. 28; Novel 123. c. 19.

⁵ fr. 8. § 5. D. 5. 2; cap. 1. in fin. de testam. in 6to. See § 721, Div. 4, *infra*.

⁶ fr. 18. D. 28. 2; fr. 16. §§ 2. 3. D. 27. 10; fr. 12. § 2. fr. 47. pr. D. 38. 2; Const. 25. C. 3. 28; *Glück*, Comm. Vol. 37, § 1425 e; *Schmidt*, p. 166, *seq.*

⁷ Gaius, II. § 174–178; Ulpian, XXII. §§ 33. 34; Paul, III. 4. B. §§ 4. 5; Inst. 2. 15; Dig. 28. 6; Cod. 6. 25; *Donellus*, Comm. jur. civ. Lib. 6, c. 23, 24; *Franck*, Diss. de origine et natura vulgaris et pupillaris substitutionis, Jena, 1829; *Glück*, Comm. Vol. 40, § 1445–1449.

other direct heir for the case that the heir first nominated will not or cannot be heir.¹ This substitution is governed by the following principles:

1. Every one entitled to make a testament can substitute in this manner.

2. As this substitution is only the nomination of another direct heir, in the event that the first named should not become the heir, therefore it can be made only by testament, and only such person can be substituted as can be instituted heir (§ 703, *supra*).

3. The substitution can be made in several ways: for the first heir may be substituted a second, for the second a third, etc. (*heredes secundo, tertio gradu scribere*), to which the rule applies, "*substitutus substituto est substitutus instituto*"²—several heirs may be substituted for one heir and one may be substituted for several;³ and several heirs of the first degree and several substituted heirs may be substituted for each other reciprocally (*substitutio reciproca s. mutua*).⁴

4. The substitution becomes effectual as soon as the case for which it was made arises.⁵

5. The effect of the substitution is that the substitute takes the place of him for whom he is substituted. And generally he receives the portion which the substituted would have received, unless he has co-substitutes, in which case he must divide with them.⁶

6. The substitution is extinguished when the instituted heir or a former substituted heir becomes heir,⁷ when the instituted heir profits by a transmission to his heirs,⁸ when the substitute dies before the instituted heir,⁹ when the substitute does not become instituted heir by the mutual substitution,¹⁰ when the substitution is conditional and the condition is not fulfilled.¹¹

¹ The substitution of direct heirs only is spoken of here. But substitutions of legacies, *fideicommissa* and *donationes mortis causa* are also permitted: fr. 50. pr. D. 31; Const. un. § 7. C. 6. 51.

² § 3. I. 2. 15; fr. 27. 41. pr. fr. 47. D. 28. 6; fr. 69. D. 29. 2.

³ § 1. I. 2. 15.

⁴ fr. 37. § 1. D. 28. 5; fr. 4. § 1. D. 28. 6; fr. 64. D. 31. Such mutual substitution differs in several points from the *jus accrescendi*: fr. 23. 24. 32. 41. pr. §§ 1. 4. D. 28. 7; fr. 9. D. 38. 16; Reuter, Diss. de substitutione reciproca, etc., Halle, 1750; Glück, Comm. Vol. 40, p. 309, *seq.*

⁵ fr. 3. 69. D. 29. 2; Const. 3. C. 6. 26. Should the testator's expression merely provide for the event that the preceding heir will not become heir, then this case tacitly includes, according to the usual opinion, the other case when he cannot become heir, and *vice versa*: arg. fr. 4. pr. D. 28. 6; fr. 101. D. 35. 1; Const. 3. C. 6. 24; Const. 4. C. 6. 26; *contra*, Glück, Vol. 40, p. 301, *seq.*

⁶ § 2. I. 2. 15; fr. 24. fr. 45. § 1. D. 28. 6; Const. 1. C. 6. 26.

⁷ Const. 5. C. 6. 26. See Glück, Vol. 40, p. 361; Rosshirt, Testam. Erbrecht, Vol. 1, p. 361, *seq.*

⁸ That is, when the instituted heir dies before acceptance the right is transmitted to his heir, who takes precedence of the substitute: Glück, Vol. 40, p. 337 *seq.*

⁹ Const. un. § 4. C. 6. 51.

¹⁰ fr. 23. 45. § 1. D. 28. 6.

¹¹ fr. 14. 21. 23. D. 28. 6.

B. PUPILLARY SUBSTITUTION.

§ 721. Pupillary substitution (*pupillaris substitutio*) consists in a father or paternal grandfather nominating an heir for an impubescent child immediately subject to his paternal power, in the event that such child should die after his father or grandfather, in his impubescence.¹ Hence it is a testament which one makes for his impubescent child, because such child, while impubescent, cannot testamentate.

1. As this right emanates from the paternal power, he only has it who has such power or would have had it if he had survived the birth of the impubescent child. He has this right in relation to those impubescent children only who, if he were inherited to *ab intestato*, would appear as his children and grandchildren (*sui heredes*), without distinction whether, at the time of the making of the testament, they were immediately in his paternal power or whether they became so afterwards, or whether they are his posthumous children (*posthumi sui*) in the narrow sense.²

2. He who is entitled may generally nominate an heir for the entire estate of the impubescent, whether such property emanated from him or whether the child acquired it otherwise.³

3. When he exercises such right he must necessarily nominate an heir for himself.⁴ He need not nominate the child, but the father may disinherit the child for just cause and may substitute for him pupillarily.⁵ Hence, in pupillary substitution, two testaments are to be considered: the one which the father makes for himself and the one which he makes for his child.⁶ He may make them both in one instrument, or one in writing and the other orally.⁷ If he make them both at the same time, then he need observe the usual formalities but once, and it is immaterial whether he nominate his own or his child's heir first;⁸ but if he make them at different times, then he must make his testament first, and must specially observe the usual form-

¹ Gaius, II. § 179-184; Ulpian, XXIII. §§ 7. 9; Inst. 2. 16; Dig. 28. 6; C. 6. 26. See § 720, *supra*, note 7; *Donellus*, Comm. jur. civ. Lib. 6, c. 25, 26; *Deneken*, Diss. de successione ex pupillari substitutione, Göttingen, 1781; *Küstner*, Diss. de pupillari testamento, Leipsic, 1788 (contains a history of pupillary substitution); *Glück*, Comm. Vol. 40, § 1450-1455.

² That is, such as are born after his death and would have been immediately in his power if he had lived: fr. 2. pr. D. 28. 6; pr. I. 2. 16. Theophilus ad h. l.; Gaius, II. § 183; Ulpian, XXIII. § 7.

³ fr. 10. § 5. D. 28. 6. The arrogating father, however, can substitute pupillarily only for the property emanating from himself: fr. 10. § 6. D. 28. 6. See § 594, *supra*.

⁴ fr. 1. § 3. fr. 2. § 1. D. 28. 6; § 5. I. 2. 16.

⁵ fr. 1. § 2. D. 28. 6; § 4. I. 2. 16.

⁶ § 2. I. 2. 16; Gaius, II. § 180; *Brunnemann*, Substitutio pupillaris vel quasi duplex testamentum, Leipsic, 1788.

⁷ fr. 20. § 1. D. 28. 6.

⁸ fr. 20. pr. D. 28. 6.

alities in each.¹ But the child's testament is always regarded as a constituent part and appendage of the father's testament, wherefore it stands or falls with it.²

4. In regard to the person of the substitutes, their number and the degree of substitution, the father is wholly unrestricted, so that he may exclude even the indefeasible heirs and birthright portioners of the child.³

5. He may nominate the pupillary substitute to endure till the child is of testamentary age, not beyond it; but he may for a shorter time.⁴

6. When the father institutes the child he cannot expressly combine the vulgar substitution only with the pupillary substitution; but whenever he has expressly mentioned only the one, the other is tacitly understood, unless he has declared the contrary.⁵

7. The pupillary substitution is extinguished when the paternal testament is invalid,⁶ when the child for whom there was a pupillary substitution becomes pubescent,⁷ when the child passes from the testator's power before his death,⁸ or dies before the father; in this case, however, it will be sustained as a vulgar substitution, according to the principle stated in div. 6, when the child has been instituted.⁹

C. THE SOLDIER'S PRIVILEGE IN REGARD TO VULGAR AND PUPILLARY SUBSTITUTION.

§ 722. The soldier, when he testaments *jure militari* (§ 697, *supra*), has many privileges in regard to vulgar and pupillary substitution.¹⁰

1. He may, even when the first heir whom he has nominated for himself will actually become heir, substitute for such heir a second, and for the second a third, etc., so that the substitute shall become his direct heir;¹¹

¹ fr. 2. § 4-7. D. 28. 6.

² § 5. I. 2. 16.

³ fr. 8. § 5. D. 5. 2; cap. 1. de testam. in 6to; Glück, Comm. Vol. 40, p. 391; Roesshirt, Testam. Erbrecht, Vol. 1, p. 384, *seq.*

⁴ fr. 7. 14. D. 28. 6. See fr. 21. *Ibid.*

⁵ Gaius, II. §§ 179. 180; fr. 1. § 1. fr. 4. pr. D. 28. 6; fr. 29. D. 28. 2; pr. I. 2. 16; Const. 2. 4. C. 6. 26.

⁶ § 5. I. 2. 16. If, however, the child were instituted, then the pupillary substitution remains valid, even if the child do not become the testamentary, but the intestate, heir: fr. 2. § 1. D. 28. 6. The pupillary substitution also continues valid if the paternal testament, according to Novel 115, ceases to exist *quoad heredis institutionem*. By the ancient law, however, it also ceased by the success of the *querela inofficiorum testamenti*: fr. 8. § 5. D. 5. 2.

⁷ pr. § 8. I. 2. 16; fr. 7. 14. 21. D. 28. 6.

⁸ fr. 2. pr. fr. 41. § 2. D. 28. 6.

⁹ See Cicero de oratore, Lib. 1. c. 39. 57.

¹⁰ Bauer, Diss. de substitutione militari, in his works, Vol. 1, No. 5; Glück, Comm. Vol. 42, p. 107, *seq.*

¹¹ fr. 5. fr. 15. § 4. D. 29. 1; Const. 8. C. 6. 26.

while in the case of the civilian (*paganus*) a universal *fideicommiss* only would be founded by such a substitution (§ 782, *infra*).

2. He has the right of pupillary substitution even when he has no paternal power over the child;¹ he may substitute pupillarily for such child even beyond the age of puberty; such substitution, however, in both cases is valid only in regard to the estate derived from the soldier.² He need not nominate an heir for himself, and hence a pupillary substitution made by him is not extinguished even if his own testament become invalid.³ Such a substitution made *jure militari*, differing from the rule of the common law, at present is termed *substitutio militaris*, and in this the rule does not apply that the pupillary substitution tacitly contains the vulgar substitution, and *vice versa*.⁴

D. QUASI PUPILLARY SUBSTITUTION.

§ 723. Justinian introduced another kind of substitution, analogous to pupillary substitution, by which he gave the ascendants to an insane child the right to nominate an heir in the event of such child dying insane, as such child, while insane, cannot testamentate. Justinian terms this kind of substitution *substitutio ad exemplum pupillaris*; at present it is termed *substitutio quasi pupillaris s. exemplaris s. Justinianeae*.⁵

1. Every ascendant of the insane child has the right to substitute in this manner, without distinction of sex or of degree, and without regard to the paternal power, provided that the insane child would be his immediate intestate heir.⁶

2. This kind of substitution can be only for those insane descendants who are permanently insane (*perpetuo mente capti*), and not for those who have lucid intervals.⁷

3. As the right given to the ascendants to substitute for their insane descendants is naught more than the right to make a testament for them, it follows that every ascendant exercising this right must be able to make a testament not only for his own estate, which he leaves to the insane person, but also of the insane's estate. When several ascendants, each for himself,

¹ fr. 28. D. 29. 1.

² Const. 8. C. 6. 26; fr. 41. § 4. D. 29. 1. See *Glück*, *Comm.* Vol. 40, p. 108–111.

³ fr. 2. § 1. D. 28. 6; fr. 15. § 5. fr. 41. § 5. D. 29. 1.

⁴ Const. 8. C. 6. 26.

⁵ Const. 9. C. 6. 26; § 1. I. 2. 16; *Donellus*, *Comm. jur. civ.* Lib. 6, c. 27; *Madiæ*, *Vicissitudines substitutionis exemplaris*, Halle, 1775; *Francke*, p. 463; *Glück*, *Comm.* Vol. 40, p. 475, *seq.*; Vol. 41, p. 1, *seq.*; *Hüffer*, *De substitut. quasi pup.*, Breslau, 1853.

⁶ This follows from the words of Const. 9. C. 6. 26.

⁷ Hence if the insane person made a valid testament previous to his insanity, then there can no longer be a quasi-pupillary substitution for him: § 1. I. 2. 12. And substitution in such manner may be for insane descendants only, but not for those who, for other causes, are incapable of testamentation, such as squanderers.

substitute quasi-pupillarily for their insane descendant, then, in regard to the estate left by each to such descendant, the particular substitute named by each will be preferred; but, in regard to such descendant's own property, the substitutes will stand to each other in the relation of co-heirs.¹

4. The ascendant exercising this right must leave to the insane descendant at least the birthright portion.² It follows that there can be no quasi-pupillary substitution for an insane descendant disinherited for a legal reason, but it does not follow that the substituting ascendant must necessarily make a testament for himself. He may die intestate and make a testament for the insane descendant only.

5. When the insane descendant has rational descendants, then the testator must substitute one or several or all of them; but in no event can he substitute strangers. If there be no rational descendants of the insane, then the testator must substitute one or several or all of the rational brothers and sisters of the insane person who, with him, are of the same stock as the testator. If there be no such brothers or sisters, or if the descendants or brothers or sisters of the insane person be insane, then the testator can substitute whom he will.

6. The substitution is extinguished as soon as the insane person recovers his understanding, or if he die before the testator, or if the substitute die before him.

TITLE FOURTH.

OF THE INVALIDITY OF TESTAMENTS.

IN GENERAL.

§ 724. A testament is valid if there be no special reason for its invalidity either at its origin or subsequently.³

I. TESTAMENTS INVALID FROM THEIR ORIGIN.

§ 725. A testament is invalid from its origin for the following reasons:

1. When something necessary to its external form has been omitted, then it is termed *testamentum injustum s. non jure factum*.⁴

2. When aught in relation to its essential contents is omitted, such as if there be not a proper institution of an heir, or if a blood heir be preterited, or the birthright heirs be not regarded, as prescribed by Novel 115, or if the testator at the time of making the testament were incapable of making it. In such cases it is termed *testamentum nullum* or *nullius mo-*

¹ See Glück, Comm. Vol. 41, p. 28.

² Const. 2. C. 6. 26.

³ Gaius, II. § 138-151; Ulpian, tit. 23; Inst. 2. 17; Dig. 28. 3; Donellus, Comm. jur. civ. Lib. 6, c. 16; Glück, Comm. Vol. 38, § 1426-1431; Vol. 39, §§ 1432, 1433.

⁴ fr. 1. D. 28. 3.

menti.¹ The *testamentum injustum* and *nullum* are wholly invalid unless the cause of the invalidity arises from Novel 115.² By the civil law they can never become valid, even if the original causes of the invalidity subsequently cease.³ When, therefore, in consequence of the lack of proper institution, or of the disinheritance of a *sui* (heir), the testament is *nullum*⁴ and the *sui* dies in the lifetime of the testator, the testament by the civil law remains invalid, but the praetor sustained it by giving to the heirs instituted by it the estate according to the testament (*bonorum possessio secundum tabulas*).⁵

II. TESTAMENTS WHICH SUBSEQUENTLY BECOME INVALID.

A. TESTAMENTUM IRRITUM.

§ 726. A testament which originally was valid may subsequently become invalid.

When the testator suffers a *capitis deminutio* (loss of status) his testament becomes *irritum*,⁶ and by the civil law is and remains wholly invalid.⁷ If the testator, however, previous to his death regain his lost status, the praetor will sustain the testament and give to the heirs instituted therein the estate given by the testament.⁸

¹ fr. 1. D. 28. 3. It is also termed *injustum*, *e. g.*, fr. 3. § 3. D. 28. 3.

² fr. 17. D. 28. 1; Const. 12. C. 6. 23; Const. 29. C. 6. 42.

³ fr. 29. 201. 210. D. 50. 17. See 2d and 3d notes to § 776, *infra*, respecting the writers on the *regula Catoniana* in legacies.

⁴ pr. I. 2. 13. A soldier's testament is not invalid for this cause, as he is not bound by the rules for institution or for disinheritance of *sui*: Const. ult. C. 3. 28. See Novel 123. c. 19; fr. 37. § 2. D. 29. 1. See note 3, p. 525, *supra*. But the soldier must have known of the existence of his *sui*: fr. 7. D. 29. 1; Const. 10. C. 6. 21.

⁵ Gaius, II. § 123; fr. 12. pr. D. 28. 3. 4; Koch, *Bonorum possessio*, pp. 311, 328, 347, 438, 440. See the writers cited § 710, *supra*, note 1.

⁶ Ulpian, XXIII. § 4. 5; Gaius, II. § 145. 146; §§ 4. 5. I. 2. 17; fr. 6. § 5. D. 28. 3; Const. 29. C. 6. 42; Glück, Vol. 39. § 1433.

⁷ Exceptions occur in cases of imprisonment by the enemy (§ 132, *supra*). If the prisoner regain his freedom by *postliminium* (return to his former condition), then his testament is revived with all its previous legal effect, and if he die during imprisonment, then, by a *lex Cornelia* of Sulla, he is inherited to as if he had died in the last moment of his freedom: fr. 32. § 1. D. 28. 5; fr. 19. pr. fr. 22. D. 49. 15; Glück, Vol. 39, p. 23, *seq.*; Hase, *Über das Jus postliminii und die fictio legis Corneliae*, Halle, 1851.

⁸ § 6. I. 2. 17; fr. 12. pr. D. 28. 3. If, however, the testament became *irritum* by the least loss of status of the testator, and the testator subsequently regained his status, such testament is sustained only when the testator by a codicil or other document declares that it shall be valid: fr. 11. § 2. D. 37. 11; Glück, Vol. 39, p. 26, *seq.* In default of such declaration the modern view, however, is that the *bonorum possessio*, according to the testament, may be given *sine re* if a legitimate heir be not wanting or such heir have been instituted: Ulpian, XXIII. 6. XXVIII. 13; fr. 12. pr. D. 28. 3.

B. TESTAMENTUM DESTITUTUM.

§ 727. When the heirs instituted by the testament will not or cannot be heirs, in consequence of their becoming incapable after their institution, or the condition on which they were instituted not having been performed, in such cases the testament becomes *destitute* (*destitutum*), unless there are co-heirs or substitutes who take the places of the failing heirs.¹ However, by the prescript of the prætorian edict, the intestate heirs instituted by the testament are not permitted in order to invalidate the legacies to refuse the inheritance *ex testamento*, and then to accept it *ab intestato*, unless the testator expressly permitted them so to do.²

C. TESTAMENTUM RUPTUM.

1. *By a Birthright Heir.*

§ 728. A testament may also become *ruptum*, which may be in two ways:

When the testator, after the making of the testament, receives a *suus* (heir), either by marital procreation, by legitimation, by adoption, or by one who was hitherto only mediately in his paternal power becoming immediately subject thereto, and which *suus* is neither properly instituted nor properly disinherited by the testament (*testamentum ruptum per agnationem postumi sui præteriti*).³ By such a rupture the entire testament becomes invalid,⁴ and by the civil law continues invalid, even when the *postumus* (subsequent heir) dies or ceases to be the birthright heir before the testator's death. The prætor, however, in such case gives to the heirs instituted by the testament the *bonorum possessio* according to the testament.⁵

2. *By Change of the Testator's Will.*

§ 729. The testator may change his will,⁶ which may be effected⁷—

¹ fr. 181. D. 50. 17. pr. § 7. I. 3. 1; fr. 9. D. 26. 2; *Zepernick*, Diss. I. II. de testamenti destituti viribus, Halle, 1773, 1774; *Glück*, Comm. Vol. 39, § 1433 a. This is not changed by Novel 1. c. 1. c. 2. § 2; *contra*, *Zepernick*, *supra*.

² fr. 1. pr. fr. 6. §§ 1. 3. D. 29. 4; Cod. 6. 39; *Glück*, Vol. 43, § 1504. Concerning another modification of the rule for the benefit of the *fideicommissarius heres*, see §§ 787 and 788, *infra*.

³ *Gaius*, II. § 138–145; *Ulpian*, XXIII. §§ 2. 3; § 1. I. 2. 17; §§ 1. 2. I. 2. 13; § 2. I. 3. 1; fr. 3. § 3 D. 28. 3; Const. 4. C. 6. 29. A soldier's testament does not become invalid because of a *postumus* for the reasons mentioned in note 4, p. 542, *supra*, fr. 7. 8. D. 29. 1.

⁴ § 1. I. 2. 13.

⁵ fr. 2. pr. D. 28. 3.

⁶ fr. 4. D. 34. 4. "*Ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum*" (the will of a testator is changeable till the last breath of life): *Glück*, Comm. Vol. 39, § 1428–1431; Vol. 39, §§ 1434, 1435; *Greve*, Diss. de mutatione et revocatione testamenti, Göttingen, 1789.

⁷ Originally a valid testament might have been revoked by a new testament only; subsequently the revocation was effected by the physical destruction of the written testament; and finally Justinian permitted revocation by the simple verbal revocation under the conditions mentioned in the first division of the text.

1. By a simple revocation of the testament, without destroying it or making a new one. Such a simple revocation, however, is only effectual when made before at least three witnesses or before the proper tribunal, and a period of ten years since the making of the testament has either expired or will expire prior to the testator's death.¹

2. By intentional destruction of the testament, by which only what is expunged or obliterated becomes invalid.²

3. By the making of a new testament,³ by which the first testament is annulled, even if this be not expressly declared in the second; ⁴ provided, however, that the latter be a valid testament.⁵ Should the testator subsequently intend to revive the first testament by annulling the second, then the first by the strict civil law still continues invalid; but the prætor gives the *bonorum possessio* according to the testament to the heirs instituted by the testament.⁶

III. TESTAMENTUM RESCISSUM.

§ 730. When a valid testament is contested by the *querela inofficiosi testamenti* and is set aside by judicial decree it is termed *rescissum*. See § 714-718, *supra*.

GENERAL CONSEQUENCES OF THE INVALIDITY OF TESTAMENTS.

§ 731. In all cases where a testament is either invalid in its origin or becomes so subsequently, or by a judicial decision is to be so regarded, the succession generally takes place *ab intestato*, provided that the testament is not

¹ Honorius, in Const. 6. C. Theod. 4. 4, prescribed that when the testator survived the making of the testament ten years such testament should be invalid. Justinian changed this in the manner stated in Const. 27. C. 6. 23. See § 7. I. 2. 17; Glück, Comm. Vol. 38, § 1429; *contra*, Rodatz, Diss. de revocatione testamenti verbalis, Göttingen, 1810.

² Dig. 28. 4; Const. 30. C. 6. 23; Glück, Comm. Vol. 39, §§ 1434, 1435. On a testament casually destroyed or lost, see fr. 1. § 3. D. 28. 4; fr. 1. § 3. 7. D. 37. 11; fr. un. D. 37. 2; Const. 11. C. 6. 23.

³ Gaius, II. § 144; § 2. I. 2. 17; fr. 2. D. 28. 3; Glück, Comm. Vol. 38, §§ 1430, 1431. When the testator has declared in the second testament that the first shall continue valid, the latter will be sustained as a *fideicommiss*: § 3. I. 2. 17; fr. 12. § 1. D. 28. 3.

⁴ Excepting in the case of soldiers who may die leaving several testaments (*qui cum pluribus testamentis decedere potest*), when the heirs instituted in the several testaments are to be regarded as co-heirs: fr. 19. pr. D. 29. 1.

⁵ Gaius, II. § 144; § 7. I. 2. 17; fr. 2. D. 28. 3; Const. 21. § 3. C. 6. 23. Excepting when a testator in an earlier perfect testament excluded his intestate heirs, whom he instituted in a later testament, which was imperfect in its external form. In such case the latter shall not be regarded as a testament, but as an intestate last will (*ultima voluntas intestati*), and will annul the earlier testament if it be proven under oath by at least five witnesses: Const. 21. § 3. C. 6. 23. The opinions on the *testamentum posterius imperfectum* are conflicting. See Glück, Vol. 38, p. 364, *seq.*; Vol. 42, § 1473.

⁶ fr. 11. § 2. D. 37. 11; Glück, Vol. 38, p. 478, *seq.*

sustained by means of the prætor, *bonorum possessio secundum tubulas*.¹ In the case of an inofficious testament, however, only in part rescinded, there may be a mixed inheritance succession, that is, partly testamentary and partly intestate (§ 717, *supra*).

SECTION THIRD.

OF THE ACQUISITION OF THE INHERITANCE.

SOURCES.—Gaius, II. § 152–173; Ulpian, XXII. § 24–34; Inst. 2. 19; Dig. 29. 2; Cod. 6. 30.

LITERATURE.—*Donellus*, Comm. jur. civ. Lib. 7, cap. 1–3; *Westphal*, System, Comm. über die Gesetze von Vorlegung und Eröffnung der Testamente, etc., Leipzig, 1794; *Glück*, Comm. § 1487–1503, Vols. 42 and 43.

CHAPTER I.

OF ACQUISITION GENERALLY.

MODES OF ACQUISITION.

§ 732. Every acquisition of an inheritance presumes a devolution of it (§ 655, *supra*).² In the acquisition of an inheritance, either *ex testamento* or *ab intestato*, there are the following distinctions:

1. If it be devolved according to the civil law (*hereditas* in the narrow sense, § 658, *supra*), then its acquisition by certain persons is inevitable, that is, they necessarily become heirs, *ipso jure*, at the moment of devolution, even unwittingly; in the case of other persons, however, it depends on their volition whether they will acquire it, and hence they acquire it only by the express or tacit declaration of their volition.³

2. The prætorian inheritance succession (*bonorum possessio*) is never acquired *ipso jure*, but always by means of the acceptance of it, *bonorum possessionis*, before the prætor; and even those persons who by the civil law become heirs *ipso jure* must ask for the prætorian succession (*bonorum possessio*) if they desire to obtain its advantages (§ 658, *supra*).⁴

I. ACQUISITION OF NECESSITY BY THE CIVIL LAW.⁵

§ 733. The persons who must necessarily *ipso jure* acquire an inheritance at the moment of its devolution to them by the civil law are the following:

¹ pr. I. 3. 1; § 6. I. 3. 2.

² The death of the estate leaver must therefore be proved: fr. 19. D. 29. 2. But at present the death of an absentee may under certain circumstances be presumed. See § 153, *supra*.

³ Inst. 2. 19. This is the *hereditatis aditio* (entering into the inheritance) in its wide sense. See § 735, note 6, *infra*.

⁴ fr. 3. § 3. D. 37. 1.

⁵ *Donellus*, Comm. jur. civ. Lib. 7, c. 1, 2; *Glück*, Vol. 42, § 1487–1490.

1. The estate leaver's slaves when he institutes them as heirs. They are termed *necessarii heredes* (heirs of necessity), and at the moment of their master's death they, *ipso jure*, attain their freedom and become his heirs.¹

2. The *sui heredes* (heirs subject to his power) of the estate leaver. The acquisition of the inheritance by them is unavoidable, whether they be called to it *ex testamento* or *ab intestato*.² To distinguish them from the *servi necessarii* (his slaves) they are termed *sui et necessarii heredes*.³ The prætor, however, gave to these *sui et necessarii*, but not to the simple *necessarii*,⁴ the *potestas abstinendi*, that is, the right to renounce the paternal inheritance. The *suus* who renounced did not therefore cease to be *heres*, which he *ipso jure* had become at the moment of the father's death, *quia semel heres semper heres manet* (once heir always heir); but the prætor by a fiction presumed that he was not heir.⁵ The effect of this fiction was that the acquisition of the inheritance did not affect him either advantageously or disadvantageously. Hence he was not bound for the debts and legacies; but the testament nevertheless did not become destitute by his renunciation.⁶ The *suus*, however, can exercise this right of renunciation only so long as he has not meddled with or taken from the inheritance.⁷

II. VOLUNTARY ACQUISITION BY ENTRY.⁸

§ 734. All heirs who are not necessary heirs acquire an inheritance devolving on them, not *ipso jure*, but by entry thereon, that is, by declaring

¹ Gaius, II. §§ 153. 154; Ulpian, XX. § 11; § 1. I. 2. 19, where the reason of the frequent institution of one's own slaves is also given. See note 4, § 703, *supra*.

² fr. 14. D. 38. 16. Especially fr. 11. D. 28. 2; Gaius, II. § 257; Ulpian, XXII. § 24. Hence, as it does not depend on their volition, they acquire the inheritance, even if they should be minors or insane: §§ 2. 3. 8. I. 3. 1; Const. 7. § 2. C. 5. 70. If, however, a necessary heir be instituted on the condition "*si volet*" (if he will), in such case he acquires the inheritance only by the declaration of his volition: fr. 12. D. 28. 7; fr. 86. D. 28. 5.

³ But in relation to the necessary acquisition of the inheritance, all those are termed *sui heredes* (see note 6, § 711, *supra*) who were in the estate leaver's power till the time of his death; but if in his immediate power, the inheritance must be actually devolved to them: Gaius, II. § 156; Ulpian, XXII. § 24; § 2. I. 2. 19; fr. 6. § 5. D. 29. 2; fr. 1. § 8. D. 38. 16; fr. 7. D. 38. 6. See Glück, Comm. Vol. 36, p. 140; Vol. 42, p. 295.

⁴ But they need not pay the decedent's debts out of their own estate subsequently acquired: § 1. I. 2. 19.

⁵ fr. 12. pr. D. 11. 1.

⁶ Gaius, II. § 158-163; Ulpian, XXII. § 24; fr. 57. D. 29. 2; fr. 30. § 10. D. 40. 5. See fr. 9. D. 37. 7; fr. 44. D. 42. 1; fr. 27. § 3. D. 36. 1; fr. 12. D. 28. 6; Van Gæthem, Diss. de suo herede, Lugd. 1786.

⁷ fr. 71. § 3-8; fr. 91. D. 29. 2. Impubescents, however, might exercise this right, even if they had meddled with the inheritance; and pubescents who had meddled easily regained this right: fr. 11. 12. 57. D. 29. 2. comp. with § 5. I. 2. 19; Gaius, II. § 163; Glück, Vol. 42, § 1490.

⁸ Donellus, Comm. jur. civ. Lib. 7, c. 3; Glück, Comm. Vol. 43, §§ 1491, 1492.

that they will accept it.¹ They are unrestrained in the acceptance or refusal of the inheritance.² Hence they are termed voluntary heirs (*voluntarii heredes*),³ and when contradistinguished from the *sui heredes* (proper heirs) they are termed *extranei heredes* (external heirs).⁴

A. NATURE AND KINDS OF ENTRY.

§ 735. The entry into an inheritance consists in the declaration of the heir that he will accept the inheritance devolved on him.⁵ This declaration may be either express or tacit. When it is express, then the civil law terms it entry into the inheritance,⁶ and the prætorian law, entry into the *bonorum possessionis*.⁷ The declaration is tacit when the heir does such acts in relation to the inheritance as permit no other explanation than that he performed them as the heir and intends to be heir. Such a tacit entry is termed acting as heir (*pro herede gerere*).⁸ On the other hand, the express renunciation of the inheritance is termed repudiation, but the tacit renunciation, especially when the heir does not exercise his right within a proper time, is termed *omissio hereditatis*.⁹ The heir must accept the inheritance as it is devolved on him, and he cannot accept it conditionally or in part.¹⁰ If he renounce it he cannot afterwards accept it.¹¹

B. WHO MAY ACCEPT AND WHO REFUSE THE INHERITANCE.¹²

§ 736. He only can accept or refuse an inheritance devolved on him who

¹ This must always be done by the heirs themselves as to the inheritance: fr. 90. pr. D. 29. 2; Const. 5. C. 6. 30. But as to the *bonorum possessio*, it may be done by a representative: fr. 3. § 7. D. 37. 1.

² § 5. I. 2. 19; *Voetke*, *Electa de aditione hereditatis*, etc., Giessen, 1783.

³ fr. 15. 16. D. 29. 2; fr. 3. § 3. D. 28. 5. Thus a *suus et necessarius* also became a voluntary heir when the testator instituted him on the condition if he will be heir: fr. 86. D. 28. 5; fr. 12. D. 28. 7. (§ 733, note 2, p. 546, *supra*).

⁴ Gaius, II. § 161; § 3. I. 2. 19. See § 26. I. 2. 20; § 7. I. 3. 1.

⁵ *Donellus*, *Comm. jur. civ. Lib. 7, c. 8, 9*.

⁶ fr. 45. pr. D. 29. 2; fr. 95. § 2. D. 26. 3. On the ancient *cernere* and the former *cum cretione* (term for deliberation of acceptance or refusal), which was abolished by Theophilus by Const. 17. C. 6. 30, see Gaius, II. § 164–178; Ulpian, XXII. § 25–34; *Hugo*, *Rechtsgesch. p. 566, seq.*

⁷ This may be done only before the magistrate (§ 658, *supra*) and only within the time prescribed by the prætorian edict, which in the case of descendants and ascendants is a year *utilis* (i. e., in which the right can be exercised), and in the case of other persons one hundred days *utiles*: § 4. in fin. § 7. I. 3. 9. (10); Dig. 38. tit. 9. 15. He who was called to the succession need not accept it in proper person (*supra*, note 1), and since the time of Constantine's sons it may be accepted within other periods and before any civil tribunal: Const. 9. C. 6. 9.

⁸ § 7. I. 2. 19; fr. 20. 88. D. 29. 2; Const. 2. C. 6. 30.

⁹ fr. 95. D. 29. 2; fr. 1. § 4. D. 36. 4; Cod. 6. 31.

¹⁰ fr. 1. fr. 2. fr. 51 § 2. fr. 52. § 1. fr. 53. D. 29. 2.

¹¹ Gaius, II. § 169; Ulpian, XXII. § 29; § 7. I. 2. 19.

¹² *Donellus*, *Comm. jur. civ. Lib. 7, c. 4–7*; *Glück*, *Comm. Vol. 43, p. 430, seq.*

is independent as to his person, and, at the time of acceptance or refusal, has the use of his understanding and freedom of disposition.

1. An *homo alieno juri subjectus* (a person subject to another's power) by the ancient law could only accept or refuse an inheritance devolved to him, by the command of the person in whose power he was.¹ If he accepted it, then it became entirely the property of the latter. The same rule exists, by the modern Roman law, as to a slave who is called to the inheritance;² but if a family son be called to the inheritance, then the rule is³ that the consent of both the father and the son is requisite for the acceptance or refusal.⁴ If the acceptance be with the father's assent, then the latter acquires only the usufruct of the property which the son inherits, and the ownership rests in the son.⁵ This rule is thus more precisely defined and modified: when the family son at the time of devolution is yet an infant (aged less than seven years), then the father alone may accept or refuse the inheritance for the son.⁶ But when the son has grown older, whether at the time he be in the paternal power or not, he may pray for restitution against the paternal acceptance or refusal. If he obtain restitution against the paternal acceptance, the father is burdened with the entire inheritance; if he obtain it against the paternal renunciation, it vests entirely in the son, and the father may not claim the usufruct of it.⁷ But should the son die in infancy, before the father had declared his acceptance or refusal, then the father may accept the inheritance for himself.⁸ When the family son at the time of devolution is *infantis major* (aged more than seven years) and refuses to accept the inheritance, then the father may accept it for himself and at his own risk, and in such case the son has no right to it; but if the father refuse his consent to its acceptance, then the son can take it for himself, and in such case the father has not the usufruct of the inheritance (§ 604, div. 1, *supra*); but in this case, if the son be still a minor, he must pray for the appointment of a curator to manage the inheritance.⁹

2. A pupil may in general accept or refuse with the authority of his tutor only.¹⁰ But if he be yet an infant, the tutor alone can accept for him.¹¹ If

¹ fr. 6. pr. § 1-4. fr. 8. § 1. fr. 13. § 3. fr. 36. D. 29. 2.

² § 3. I. 2. 9.

³ The cases in which the inheritance is devolved on the family son as a free *peculium* are excepted (§ 602, *seq.*, *supra*).

⁴ Const. 4. Const. 18. § 4. C. 6. 30.

⁵ Const. 6. Const. 8. § 3. C. 6. 61.

⁶ Const. 18. pr. C. 30. See also Const. 3. C. 6. 9.

⁷ Const. 8. § 6. C. 6. 61.

⁸ Const. 18. § 1. C. 6. 30. See § 746, *infra*.

⁹ Const. 8. pr. §§ 1. 2. 3. C. 6. 61.

¹⁰ fr. 9. § 3. D. 26. 8; fr. 9. 49. D. 29. 2. The tutor, however, may, by the Pandects, accept the *bonorum possessio* for him, be he an infant or *infantia major*: fr. 11. D. 26. 8; fr. 7. § 1. fr. 11. D. 37. 1; fr. 65. § 3. D. 36. 1. See Const. 7. C. 6. 9.

¹¹ Const. 18. §§ 2. 3. C. 6. 30. See fr. 65. § 3. D. 36. 1.

the pupil be *infantia major* and have no tutor, then he may be empowered by the magistrate to accept.¹

3. A *minor pubes* (aged between fourteen and eighteen years) by the Roman law may himself accept the inheritance, without requiring the assent of the curator (§§ 640, 641, *supra*).² A squanderer requires his curator's consent.³

4. If an inheritance be devolved on an insane person, then, if he be called as necessary heir, he acquires the inheritance, because it does not depend on his will;⁴ in all other cases of the devolution of an inheritance to him as a necessary heir, neither he himself can accept it nor his curator for him. By the Justinian law not even the acceptance of the ordinary *bonorum possessio* by the curator was permitted in these cases. But the curator must petition for a temporary *bonorum possessio* for the insane person, and manage the inheritance in the same manner as his other estate.⁵ If the insane person recover his reason he must declare whether he will retain or refuse the inheritance. But if he die insane, or if he expressly refuse the inheritance, he who has hitherto managed it must deliver it to those persons who are called to the inheritance next after the insane person.⁶

C. HEREDITAS JACENS (VACANT INHERITANCE).

§ 737. So long as no one has acquired the inheritance it is termed *hereditas jacens*, and this, by a legal fiction, represents the person of the decedent.⁷ A consequence of which is its capability in various ways of acquiring, losing or being bound, but not in every way, and especially not in the way in which a person's own act is requisite to acquire, lose or be bound, unless the estate leaver had already undertaken the act.⁸ A curator must be appointed

¹ Const. 5. 18. § 4. C. 6. 30. The latter is also applicable to the acceptance of the *bonorum possessio*: Const. 7. C. 6. 9.

² This, however, is doubtful: *Glück, supra*, p. 439. See fr. 90. pr. D. 29. 2; fr. 3. § 7. D. 37. 1.

³ fr. 5. § 1. D. 29. 2. See fr. 8. pr. D. 29. 2. and fr. 6. D. 45. 1; *Glück*, Vol. 42, p. 432.

⁴ § 3. I. 3. 1; fr. 63. D. 29. 2; Const. 7. § 2. C. 5. 70.

⁵ Const. 7. § 3. C. 5. 70. See Dig. 37. 3; *Glück*, Vol. 42, p. 445.

⁶ Const. 7. §§ 8. 9. C. 5. 70; *Beemann*, Diss. de acquisitione hereditatis dementi delatae, Göttingen, 1772; *Rotemund*, Diss. de successione furioso delata, Göttingen, 1825.

⁷ fr. 34. D. 41. 1; § 2. I. 2. 14; pr. I. 3. 17. (18); fr. 31. § 1. D. 28. 5; fr. 13. § 5. D. 43. 24; fr. 1. pr. D. 1. 8.

⁸ fr. 3. pr. § 6. fr. 21. § 1. D. 3. 5; fr. 20. § 3. fr. 25. § 20. fr. 26. 27. § 1. fr. 29. 30. 40. §§ 1. 2. fr. 56. D. 5. 3; fr. 43. D. 9. 2; fr. 15. pr. D. 18. 2; fr. 61. pr. D. 41. 1; fr. 31. § 5. fr. 40. fr. 44. § 3. D. 41. 3; fr. 13. § 5. D. 43. 24; fr. 77. D. 45. 1; fr. 22. D. 46. 1; fr. 24. D. 46. 3; fr. 1. § 15. D. 47. 4; fr. 1. § 6. D. 47. 10; fr. 2. § 1. fr. 6. D. 47. 19; fr. 1. § 15. D. 47. 4. The views respecting this fiction are very conflicting: *Sacigny*, System, Vol. 2, p. 363, seq.; *Glück*, Comm. Vol. 43, p. 41, seq.; *Schurmer*, De trib. reg. jur. in hered. jac., Breslau, 1852.

for the inheritance.¹ The fiction ceases as soon as the heir enters on the inheritance, and he is regarded as if he had accepted it at the moment of the estate leaver's death.²

D. FORFEITURE OF INHERITANCES AND LEGACIES FOR UNWORTHINESS.³

§ 738. There are a number of cases in which the heirs or legatees are deprived for unworthiness of the property left to them. In these cases, which are termed cases of unworthiness (indignity), the law says *heres vel legatarius capere non potest* (the heir or legatee is incapable of taking), or *ei eripitur* (wrested from). The forfeited estate in some cases vests in the fiscus and in some in other persons.⁴

I. Among these cases some are common to inheritance and legacies.

A. The following forfeitures enure to the benefit of the fiscus. The heir or legatee is regarded as unworthy—

1. If he kill or strive to take the life of the estate leaver.⁵
2. If he contest the testament as inofficious or falsified and lose the suit.⁶
3. If he undertake a secret trust imposed by a testament to do that which is forbidden by law, such as to convey to an incapable person (*fideicommissum tacitum*, § 782, note 5, *supra*).⁷
4. If one by force or fraud prevent the estate leaver from making or altering a last will, in which case the constrainer or defrauder is deprived of that which he would gain thereby.⁸
5. If the governor of a province marry a provincialist or a guardian marry his ward in violation of law, then what the wife leaves to him is confiscated.⁹
6. If a marriage forbidden because of adultery or incest subsisted between the estate leaver and the heir or legatee.¹⁰
7. If the heir or legatee contest the estate leaver's status.¹¹

¹ fr. 1. § 4. in fin. D. 50. 4; fr. 22. § 1. D. 42. 5.

² fr. 54. D. 29. 2; fr. 138. pr. fr. 193. D. 50. 17; fr. 24. D. 46. 2; *Koeppen*, De vi quam retro exercent aditio hereditatis, Jena, 1853.

³ Dig. 34. 9; Cod. 6. 35; *Roszhirt*, Erbrecht, § 7; *Keller*, Grundr. § 347.

⁴ fr. 15. pr. D. 29. 5; fr. 2. § 1. fr. 13. fr. 16. D. 34. 9; Const. 4. C. 6. 35. The *hereditatis petitio* is the action by means of which the fiscus and other persons may enforce their rights of forfeiture when an inheritance is devolved to an unworthy person.

⁵ fr. 3. D. 34. 9; fr. 7. § 4. D. 48. 20; Const. 10. C. 6. 35; fr. 9. D. 49. 14; fr. 12. D. 48. 10; *Koch*, De bonis hereditatis, etc., Leipsic, 1778.

⁶ fr. 8. § 14. fr. 22. §§ 2. 3. D. 5. 2; fr. 5. §§ 1. 3. 5. 6. 16. D. 34. 9; fr. 13. § 9. fr. 29. § 1. D. 49. 14; *Keller*, Grundr. p. 393-396.

⁷ fr. 10. D. 34. 9; fr. 3. § 4. D. 49. 14; fr. 103. D. 30; *Keller*, p. 408, *seq.*

⁸ fr. 1. pr. § 2. fr. 2. pr. D. 29. 6; *Glück*, Vol. 43, §§ 1507, 1508; *Keller*, p. 392, *seq.*

⁹ fr. 2. §§ 1. 2. D. 34. 9. See § 555, *supra*, Div. 5 and 6; *Keller*, p. 406.

¹⁰ fr. 13. D. 34. 9; Const. 4. C. 5. 5; *Keller*, p. 406, *seq.*

¹¹ fr. 9. § 2. D. 34. 9.

8. If the heir or legatee omit to fulfill the dispositions by last will, the estate vests in the *fiscus* if there be no persons who take precedence of it.¹

9. All property left to dissolute and disreputable women is confiscated, but certain near kin take precedence of the *fiscus*.²

B. The following forfeitures enure to the benefit of persons other than the *fiscus* :

1. If the heir or legatee refuse to undertake the rearing or culture of persons directed by the decedent in his last will, in which case the co-heirs, substitutes or intestate heirs, and in legacies he who is charged with their payment, receives the forfeiture.³

2. The same rule applies if the heir or legatee omit the decedent's burial committed to his charge.⁴

3. If the heir or legatee decline the guardianship committed to his charge by the last will, then the inheritance descends to the substitutes, co-heirs or intestate heirs, the legacy to the ward.⁵

4. If the heir or legatee violate any of the provisions of the last will, then the next heir succeeds, and after him the intestate heirs succeed.

II. Those which relate to inheritances only.

A. The *fiscus* succeeds—

1. If the heir omit to prosecute legally for the murder of the estate leaver.⁶

2. If he, during the estate leaver's life, make conventions without the latter's consent respecting the estate to be left by him.⁷

3. If the estate leaver purposely expunge the heir's name or revoke his institution as heir by a testament, invalid because of the institution of an incapable person.⁸

4. If the heir secrete or carry off part of the inheritance, to the injury of the legatees, he forfeits the Falcidian portion and the *fiscus* receives it.⁹

B. For the benefit of other persons the heir is regarded as unworthy—

1. If he neglect to petition for a guardian for the pupil.¹⁰

¹ Novel 1. c. 1. 4.

² fr. 13. 14. D. 34. 9; fr. 41. § 1. D. 29. 1; Const. 3. C. Th. 2. 19. See *Savigny*, *Syst.* Vol. 2, p. 558; § 703, *supra*, note 2.

³ fr. 1. § 3. D. 27. 2.

⁴ fr. 12. § 4. D. 11. 7.

⁵ fr. 28. § 1. D. 27. 1; fr. 5. § 2. D. 34. 9.

⁶ According to the *Scto Silaniano*: fr. 9. fr. 15. D. 29. 5; Const. 1. 5–10. C. 6. 35; *D'Escrny*, *Diss. ad tit. Dig. de Scto Silaniano*, Leyden, 1827; *Glück*, Vol. 43, §§ 1505, 1506. The heir who for this cause is unworthy is deprived for the benefit of the *fiscus* of any legacy intended for him: fr. 15. § 1. D. 29. 5.

⁷ fr. 2. in fin. D. 34. 9; fr. 29. § ult. fr. 30. D. 39. 5. See Const. 30. C. 2. 3.

⁸ fr. 12. fr. 16. § 2. D. 34. 9; Const. 4. C. 6. 35.

⁹ fr. 6. D. 34. 9.

¹⁰ See note 9, § 625, *supra*. This applies to intestate heirs and to pupillary substitutes.

2. The church of the estate leaver's birthplace receives the inheritance when his testamentary or intestate heirs permitted him to perish in an enemy's prison.¹

3. The curator of an insane person succeeds to the place of his heirs if, when requested by such curator, they refuse to take the care of the insane person.²

III. Those for legacies only. For the benefit of those who are charged with the payment of the legacies, legatees are treated as unworthy—

1. If they purloin property bequeathed to them.³

2. If they fraudulently secrete the testament.⁴ All these cases of unworthiness are expressly confirmed by Justinian.⁵

E. THE FORMER LAW OF CADUCITY (LAPSING).

§ 739. By the same *lex Julia et Papia Poppæa* (§ 44, *supra*, note 2), by which the first lapsing of legacies or inheritances was probably introduced, institutions of heirs and legacies were peculiarly affected, because they were lapsing (*caduca*) or liable to lapsing (*in causa caduci*).⁶

I. By the above *lex* the following are lapsed:

A. 1. That which was given to a person who, contrary to law, lives in celibacy, by a testator who is not his near kinsman, unless he marry within one hundred days.⁷

2. The half of that property given by a testator to a person not of his kin, who, though not a celibate, yet, contrary to law, is childless.⁸

3. Generally the excess beyond certain tenths of the inheritance which the testator or testatrix gave to his or her wife or husband, by whom he or she had not begotten a living child.⁹

4. That which was validly devised, but the devise, for some causes, failed after the testator's death. Here it should be remarked that this *lex* postpones the devolution till the opening of the testament.¹⁰

¹ This also applies to the previously instituted testamentary heirs, as well as to the intestate heirs: Novel 115. c. 3. § 13. c. 4. § 17.

² Whether they be testamentary or intestate heirs: Novel 115. c. 3. § 12; Novel 22. c. 47. See *Glück*, Comm. Vol. 36, p. 386, *seq.*

³ fr. 48. D. 36. 1; Const. 5. C. 6. 37.

⁴ Const. 25. C. 6. 37.

⁵ Const. un. § 12. C. 6. 51.

⁶ See the works cited in § 752, note 4, and § 770, *infra*, note 4.

⁷ Gaius, II. §§ 111. 144. 286; Ulpian, XIV.; XVII. § 1; XXII. § 3.

⁸ Gaius, II. § 286; Ulpian, XIII.

⁹ Ulpian, XV.; XVI. § 1. The rules of divisions 1, 2, 3, originally related to inheritances and legacies only; but by a special senatusconsultum they were extended to *mortis causa donationes*: fr. 9. D. 39. 6; and by the *Sctum. Pegasianum* they were extended to the *fideicommissa*: Gaius, II. § 286.

¹⁰ Gaius, II. § 206; Ulpian, XXIV. §§ 12. 13. 31; Const. un. §§ 2. 5. C. 6. 51.

B. That is lapsed (*in causa caduci*) which was validly devised, but the devise failed during the testator's life.¹

C. Between things *caducum* (lapsed) and *in causa caduci* (liable to lapse) there are the following distinctions:

1. If the entire testament be rendered heirless by lapsing, there are no special consequences.

2. In other cases, if there be no substitute—

a. Those are next called who have the *jus antiquum in caducis*, that is, the authority to claim the inheritance or legacy by virtue of the right of increase, as co-heirs or co-legatees, or, if it be a legacy, by virtue of the reversion, as the person who was charged to pay it, according to the rules existing before this *lex*; but only the estate leaver's descendants and ascendants to the third degree had this *jus antiquum*.²

b. If no one had this *jus antiquum*, then the *caduca vindicare* (claimants of the lapsed property) followed, to which were called, in a certain order of succession, males who are legatees in the testament and have children of their body (*ii, qui in eo testamento liberos habent*), and after them the *ærarium* (public treasury). He who obtained the lapsed property had to bear the burden which the estate leaver had imposed upon the inheritance portion or upon the legacy.³

II. Since the *lex Junia Norbana* (§ 132, *supra*), what is left to a *latinus Junianus* is regarded the same as that left to a celibate, if he do not acquire the *jus Quiritium* (Roman citizenship) within one hundred days.⁴

III. By an ordinance of Antoninus Caracalla, the imperial fiscus, instead of the *ærarium*, was entitled to the lapsed property.⁵

IV. Under the Christian emperors lapsing gradually ceased to exist. Constantine abolished the penalties for celibacy and limited those of orbitude.⁶ Theodosius II. abolished the provisions respecting the tenths in the case of husbands and wives, and the penalties for being childless, and gave to all the *jus liberorum* (the same right as if they had children), so that the lapsing which might arise could be vindicated by those who were provided for in the testament, even if they had no children.⁷ Under Justinian the *latina libertas* ceased to exist,⁸ and he also decreed that what had been validly devised and subsequently failed should no longer be governed by the rules of caducity. A

¹ Const. ~~un.~~ § 4. C. 6. 51.

² Ulpian, XVIII.; Const. un. C. 6. 51.

³ Gaius, II. §§ 206. 207. 286; Ulpian, I. § 21; XVII. §§ 1. 3.

⁴ Gaius, I. §§ 23. 24; II. §§ 110. 275; Ulpian, XVII. § 1; XXII. § 3; XXV. § 7. This prescript, which originally related to inheritances and legacies only, was at a later period extended to *mortis causa donationes*, but not to *fiducicommissa*: Gaius, II. § 285; Ulpian, XXV. § 7; Vat. Fragm. § 259.

⁵ Ulpian, XVII. § 2.

⁶ Const. 1. C. Th. 8. 16; Const. 1. O. 8. 58.

⁷ Const. 2. 3. C. Th. 8. 17; Const. 2. C. 8. 58; Const. 1. C. 8. 59.

⁸ Const. un. C. 7. 6.

constitution of the year 534¹ provides that the devolution of inheritance succession and legacies shall no longer be postponed till the opening of the testament.²

CHAPTER II.

THE EFFECT OF THE ACQUISITION OF AN INHERITANCE.³

I. IN GENERAL.

A. REPRESENTATION OF THE ESTATE LEAVER AND DUTY OF PERFORMING HIS TESTAMENTARY DISPOSITIONS.

§ 740. The effect of the acquisition of an inheritance is generally—

1. That in relation to the estate leaver's estate the heir and the estate leaver are regarded as one person. From which follows that the estate of the heir and that of the estate leaver are regarded as one (*confusio bonorum defuncti et heredis*);⁴ the heir succeeds to all the assets and liabilities of the estate leaver, excepting those which are strictly personal,⁵ and hence is bound for all his debts⁶ which are not strictly personal, even if the inheritance should not be sufficient.⁷ He must also assume all the estate leaver's transactions respecting his estate.⁸

2. The heir is also bound to perform the estate leaver's testamentary dispositions, and especially to fulfill the legacies and *fideicommissa* imposed on him, but only so far as the inheritance, after deduction of debts, will cover.⁹ This duty of the heir towards legatees and *fideicommissaries* is regarded as an obligation *quasi ex contractu*.¹⁰

¹ Const. un. C. de caducis tollendis (6. 51). The other caducity was abolished previously: Const. 2. § 6. Const. 3. § 6. C. 1. 17.

² Const. un. § 5. C. 6. 51.

³ Glück, Vol. 43, § 1493, *seq.*; Keller, Grundriss, § 316.

⁴ fr. 75. fr. 95. § 2. D. 46. 3. See Glück, Vol. 43, p. 100, *seq.*

⁵ But he must reduce the estate leaver's property into his actual possession: fr. 23. pr. D. 41. 2.

⁶ The debts of the heir to the estate leaver naturally cease, as also the estate leaver's real rights in the heir's estate and the heir's rights in the estate leaver's estate. See § 323, div. 2; § 358, div. 2; § 543, *supra*.

⁷ fr. 8. pr. D. 29. 2; Const. 10. Const. 22. §§ 12. 14. C. 6. 30. The soldier is bound for the debts, but only so far as the estate covers them: Const. 22. pr. § 15. C. 6. 30. See § 733, *supra*, note 4, p. 546.

⁸ fr. 1. pr. § 1. fr. 3. D. 21. 3; Const. 3. C. 4. 51.

⁹ fr. 23. in fin. D. 42. 8; fr. 17. D. 39. 6. When the legacies exceed the inheritance they are to be proportionately abated, but the heir retains his right to the *Falcidia*: fr. 80. D. 30. By the modern law the heir, to enjoy this advantage, must make a proper inventory: Novel 1. c. 2. § 2. and end of § 743, *infra*.

¹⁰ § 5. I. 3. 27. (28); fr. 5. § 2. D. 44. 7; fr. 3. § ult. fr. 4. D. 42. 4.

B. MEANS OF AVOIDING THE DISADVANTAGES ARISING FROM REPRESENTING THE ESTATE LEAVER.

1. *For the Heirs.*

§ 741. As the acquisition of an indebted estate may be disadvantageous to the heirs, to avoid such disadvantage there are two ways, the time for deliberation (*spatium deliberandi*) and the benefit of the inventory (*beneficium inventarii*).¹

a. *By the Jus deliberandi.*

§ 742. By *spatium deliberandi* (time for deliberation) is understood a term granted by the proper officer at the request of him who is called to the inheritance, within which he has the right to investigate its condition and to consider whether he will accept or reject it.² It was introduced by the prætorian edict, but Justinian, when he introduced the benefit of the inventory, subjected it to several limitations. In this right of deliberation there are the following distinctions :

1. When the heir is pressed by other heirs (such as co-heirs, substitutes or intestate heirs), or by creditors of the inheritance, to declare whether he accepts or rejects the inheritance, then he must either determine immediately or pray for time for deliberation, which by Justinian's ordinance must be allowed to him by the regent for one year or by the judges for nine months from the day of such allowance.³ If he do not determine before the expiration of this term the Justinian law presumes that he has accepted the inheritance.⁴ If he die before the expiration of the term for deliberation, the unexpired time may be used by his heirs to determine whether they will accept or reject the inheritance. But if they permit the term to expire without determining, they acquire the inheritance.⁵

2. When the heir is not pressed, he of right has a year from the day when he first knew of the devolution to him as time for deliberation, so that should he die during the year without having determined, his heirs are at liberty to accept or reject the inheritance. But if he permit the year to expire without having determined, and die, no transmission takes place, unless he before the expiration of the year prayed for further time for deliberation, when the transmission may take place within this additional time.⁶ However, should he live, he does not lose the inheritance by not determining within the year.

¹ This is also applicable to a *suus heres*: fr. 8. D. 28. 8.

² Dig. 28. 8; Cod. 6. 30; *J. C. Koch*, De herede deliberante, Giessen, 1783; *Glück*, Vol. 41, § 1466, seq.; *Ermerins*, Diss. ad jur. Rom. locum de jure deliberandi, Leyden, 1817.

³ Const. 22. § 13. C. 6. 30. See fr. 3. 4. D. 28. 8.

⁴ Const. 22. § 14. C. 6. 30. According to the earlier law the inheritance was lost: fr. 69. D. 29. 2.

⁵ Const. 19. C. 6. 30; *Unterholzner*, Verjährungslehre, Vol. 2, § 166; *Glück*, Vol. 41, § 1467, § 1469, p. 399, seq.; Vol. 43, p. 218, seq.

⁶ Const. 19. C. 6. 30.

3. When the heir, after having been given time for deliberation, accepts the inheritance, he becomes immediately bound for all the estate leaver's debts, whether the estate be solvent or not,¹ and the same rule applies to him who, not having declared his rejection within the designated time, is regarded as heir.

b. *By the Benefit of the Inventory.*

§ 743. By the ancient law every heir who had actually become heir was absolutely bound for all liabilities, even if they exceeded the assets of the estate. The soldier only was excepted; he was bound to the extent of the estate only.² This preference to the soldier was conceded by Justinian to every heir who made a proper inventory of the inheritance.³

A. As regards the form to be observed, Justinian prescribed the following:

1. The heir must commence the inventory within thirty days from his first knowledge of the opening of the testament or the devolution of the inheritance to him, and must complete it within sixty days thereafter. But when the heir is absent he has one year from the day of the death for the beginning and completion of the inventory.

2. The inventory must be made in the presence of a notary.⁴

3. The heir must subscribe the inventory and therein set forth the amount of the assets, and declare that he has faithfully accounted for all, and that he has not fraudulently omitted or will not omit anything. If he cannot write he must subscribe it with a cross, which must be witnessed by another notary. He may also be required to take an oath that he has faithfully noted everything in the inventory. Should he conceal anything he must account doubly for it.

B. The effect of entering into the inheritance with an inventory is as follows:

1. The heir does not cease to be heir, but is protected against all damages, inasmuch as he must satisfy the legatees and creditors to the extent of the inheritance only; to this end he must reduce everything to money or give it in payment.

2. During the taking of the inventory the creditors and legatees cannot press the heir for payment. After the completion of the inventory he may satisfy them in the order that they present their claims without regard to rights of pledge, hypothecation or privileges; and after the estate has been

¹ Const. 22. § 14. C. 6. 30.

² Const. 22. pr. § 15. C. 6. 30. See § 740, *supra*, note 6.

³ Const. 22. C. 6. 30; Novel 1. c. 1. 2. On the whole doctrine, see *Wyss*, De beneficio inventarii, Heidelberg, 1814; *Glück*, Vol. 41, § 1468, *seq.*

⁴ By Novel 1. c. 2. § 1. the heir on whom burdens are imposed, such as *fideicommissa*, in order to avoid the disadvantages specified in division 6, must invite the legatees who are at the place to be present, and for those absent three witnesses are summoned to represent them.

exhausted, no further claim can be made against him or against the purchaser of the inheritance property (§ 359, note 4, *supra*).

3. The heir may first deduct all necessary expenses for the burial of the estate leaver, opening of the testament and taking of the inventory.

4. The heir's claims against the estate leaver are not extinguished; hence the heir may first pay his own claim, but he must pay to the estate his indebtedness to the estate leaver.

5. If the heir permit the legal period to pass without making an inventory, he loses its advantages, and the same effect takes place if he pray for time for deliberation; hence he must choose whether he will make an inventory or pray for time for deliberation.¹

6. By a subsequent ordinance in Novel 1, chapter 2, § 2, in addition to the foregoing, it is prescribed that the heir who enters without an inventory must not only pay the legatees without deduction the *Falcidia*, but must also pay their legacies in full, and, if necessary, out of his own property.

2. For the Inheritance Creditors and Legatees (*beneficium separationis*).

§ 744. When in consequence of the heir's indebtedness the inheritance creditors and legatees are in danger of losing their claims, the prætorian edict gives them a remedy by which they may avoid this danger. They may insist that the estate leaver's estate shall be kept separate from the heir's estate, and that the former shall be appropriated exclusively for the satisfaction of their claims.²

1. This benefit of separation is for the advantage of the inheritance creditors, and if after their satisfaction there be assets they shall be for the legatees.³

2. This benefit is specially advantageous to the chirographic creditors of the inheritance, inasmuch as they take precedence even of those persons to whom the heir has given a lien on the inheritance estate.⁴

3. The creditors must claim separation within five years after entry into the inheritance.⁵

4. If separation were made on the creditors' petition, then they have no further claim to the heir's own estate.⁶

5. The inheritance creditors cannot claim separation if, after entry into the inheritance, they in any wise have recognized the heir as their debtor.⁷

¹ Const. 22. § 1-14. C. 6. 30.

² Dig. 42. 6; *Reinhardt*, Lehre vom Gant, § 54, *seq.*; *Steubel*, De jure separationis, etc., Leipzig, 1822; *Dyckmeester*, Diss. de separatione bonorum, Leyden, 1823.

³ fr. 6. D. 42. 6.

⁴ fr. 1. § 3. D. 42. 6.

⁵ fr. 1. § 13. D. 42. 6; *Unterholzner*, Verjährungslehre, Vol. 2, § 164.

⁶ fr. 1. § 17. fr. 3. § 12. fr. 5. D. 42. 6.

⁷ Thus by crediting after maturity or acceptance of a pledge: fr. 1. §§ 11. 15. D.

6. The benefit of separation is only for the estate leaver's creditors and not for the heir's creditors.¹

7. If there be assets of the inheritance remaining after satisfying those for whom it was separated, then the heir's creditors may claim it.

C. TRANSMISSION.

1. *Of the Acquired Inheritance.*

§ 745. An important consequence of the acquisition of the inheritance is that the heir transmits it to his heirs as a part of his own estate.²

1. As the necessary heir of right acquires an inheritance descending to him at the very instant of its devolution, it follows that he transmits it to his heirs if he survive the estate leaver but a moment, though he did not know of its descent.³

2. But the voluntary heir or the *bonorum possessor* acquires an inheritance descending to him only by entering thereon, and hence in relation to transmission the rule applies to them: an inheritance not entered on cannot be transmitted to heirs (*hereditas nondum adita non transmittitur ad heredes*).⁴

2. *Transmission of the Right of Entry.*

§ 746. The rule that an inheritance not acquired cannot be transmitted, has an exception in that a voluntary heir has the right to transmit to his heirs the inheritance devolved to him, even should he die before determining his acceptance or rejection of it,⁵ which includes—

1. If the heir could not enter because of a legal impediment, then on the cessation of such impediment his heirs may accept such inheritance.⁶

2. If the heir could not enter into the inheritance because of his absence on state affairs, his heirs may pray for restitution because of his absence and then enter into the inheritance;⁷ and the same rule applies if the heir himself could have obtained restitution against the consequences of the omission

42. 6, or if the inheritance property be so mingled with the heir's property that a separation is impossible, in which is included, if the heir have already sold it *bona fide*: fr. 1. § 12. fr. 2. D. 42. 6.

¹ fr. 1. § 2. D. 42. 6. Except if the ordinary debtor to the inheritance entered into it fraudulently to their disadvantage: fr. 1. §§ 5. 6. 8. D. 42. 6.

² *Duareni*, Comm. in tit. Dig. de acq. vel om. hered. cap. 5, in his works, p. 450; *Bucher*, Diss. de jure transmissionis hereditatis et legati, Marb. 1805; *Donellus*, Comm. jur. civ. Lib. 7, c. 4; *Steppes*, Die Transmission der Erbschaft, Munich, 1831; *Glück*, Comm. Vol. 43, p. 143, *seq.*

³ Const. 3. C. 6. 30.

⁴ Const. 7. C. 6. 30; Const. 4. C. 6. 9; Const. un. § 5. C. 6. 51.

⁵ *Glück*, Comm. Vol. 43, p. 143, *seq.* See the writings cited in note 2, *supra*.

⁶ fr. 3. § 30. fr. 4. D. 29. 5; fr. 4. § ult. fr. 5. D. 37. 4; fr. 12. D. 37. 10; *Glück*, Comm. Vol. 43, p. 165, *seq.*

⁷ fr. 30. pr. fr. 86. pr. D. 29. 2; Const. 1. C. 2. 51.

of entering upon the inheritance, and died before the expiration of the term for restitution.¹

3. If an inheritance be devolved to an infant, and the father in whose power he is omit its acquisition, then, if the child die in infancy, the father, by an ordinance of Theodosius II. and Valentinian III., may enter into it for himself. The father has the same right if the child were *sui juris* at the time of devolution (*transmissio ex capite infantie*).²

4. If a descendant be instituted as heir by the testament of an ascendant and die before the opening of the testament, then the right to accept the inheritance vests in his descendants. This is also founded on a constitution of Theodosius II. and Valentinian III., and hence is now termed the *transmissio Theodosiana*.³

5. If an heir die within the first year after he knew of the devolution of the inheritance to him, or before the expiration of the time for deliberation for which he prayed and which was granted to him, without having declared his determination, then his heirs may still enter into the inheritance during the remainder of the year or of the deliberation term. This kind of transmission is now termed the *transmissio Justiniana*, because it is founded on a constitution of Justinian's.⁴ He who, by virtue of one of these transmissions, may still acquire the inheritance excludes all those persons whom the estate leaver would have excluded, and hence he excludes his substitutes.⁵

D. THE HEIR'S LEGAL REMEDIES.

1. *Petitory.*

§ 747. For the judicial pursuit of the inheritance, and of the right of inheritance, the heir has petitory as well as possessory remedies. Among the petitory legal remedies is the suit for the inheritance (*hereditatis petitio*).⁶

1. This suit may be instituted by every heir, testamentary or intestate,⁷

¹ Glück, Comm. Vol. 43, p. 157, seq.

² CODAT. 18. §§ 1. 3. C. 6. 30; Glück, Vol. 42, p. 443, seq.; Vol. 43, p. 199, seq. On the earlier law, see fr. 30. pr. D. 29. 2. On the definition of transmission, see Glück, Vol. 43, p. 227, seq.

³ Cod. 6. 52; Niemeyer, Diss. de transmissione Theodosiana, Halle, 1812; Diehl, Diss. de transmissione Theodosiana, Heidelberg, 1814; Wolff, De transmiss. Theodos., Marb. 1850.

⁴ Const. 19. C. 6. 30. See § 742, notes 2 and 5, *supra*, and the works therein cited.

⁵ See Const. un. § 13. C. 6. 51; § 720, note 8, p. 537, *supra*; Glück, Comm. Vol. 40, p. 341, seq.; Vol. 43, p. 237.

⁶ Dig. 5. 3; Cod. 3. 31; Glück, Vol. 7, § 562-571; Rosshirt, Test. Erbrecht, Vol. 2, § 116-138.

⁷ fr. 1-3. D. 5. 3. A suit for the inheritance instituted by the intestate heirs against the testamentary heirs, in which the validity of the testament is contested at the same time, is at present termed *hereditatis petitio qualificata*.

civil or prætorian,¹ direct or *fideicommissary*,² *heres ex asse* (for the whole) or *ex parte* (for part).³ It may be instituted as a *utilis* action by the person who purchased from the heir the inheritance or a part of it.⁴

2. It may be instituted only against the person who contests the plaintiff's right of inheritance and retains property which belongs to the estate, be it the whole estate or a part, or only individual things belonging thereto. Hence the suit may be instituted against him only *qui pro herede possidet*, that is, against him who believes himself or pretends to be heir, and thereby denies the plaintiff's right of inheritance,⁵ and against him *qui pro possessore possidet*, that is, against him who cannot assert a sufficient title for his possession, but yet denies the plaintiff's right of inheritance.⁶

3. The object of the suit is to compel the recognition of the heir as sole or co-heir, and the delivery of either the entire inheritance, or of that part due to the plaintiff, or of that part in the possession of the defendant, *cum omni causa* (with all accessories).⁷

Respecting the accessions:

a. The *bonæ fidei* possessor before suit need only restore those of the accessions received which still exist; but of those consumed he need only compensate to the extent that he was enriched thereby. After the institution of suit the *bonâ fide* possessor must restore all accessions which he received, and is also bound for those which he might have received, but not for those which were casually lost.⁸

b. The *malæ fidei* possessor must absolutely restore all accessions, those received as well as those he might have received.⁹

¹ Dig. 5. 5. If it be instituted by the prætorian heir it is termed *possessoria hereditatis petitio*: Glück, Vol. 8, § 573.

² fr. 1. 2. D. 5. 6. If it be instituted by the *fideicommissary* heir it is termed *fideicommissaria hereditatis petitio*. This suit can only be instituted after restitution, but not against the person who restored the inheritance: fr. 3. § 1. D. 5. 6; fr. 27. § 7. fr. 37. pr. D. 36. 1.

³ Dig. 5. 4; Glück, Vol. 8, § 572.

⁴ fr. 54. pr. D. 5. 3. But the *hereditatis petitio* is not only a *utilis* action in this case, but is so generally when it is instituted by one who is not heir, but is *heredis loco* (in place of heir), as, for example, the *bonorum possessor* and the *fideicommissary* heir.

⁵ Gaius, IV. § 144; fr. 9. 11. D. 5. 3; § 3. I. 4. 15. and Theophilus ad h. 1.

⁶ Gaius, IV. § 144; § 3. I. 4. 15; fr. 11-13. fr. 18. § 2. fr. 19. D. 5. 3. In both cases (*pro herede et pro possessore*) the action may be instituted against the *factus possessor*: fr. 13. §§ 13. 14. D. 5. 3; fr. 7. D. 6. 1. But when he who, without contesting with the plaintiff the right of inheritance, possesses individual things belonging to the inheritance, by another title, such as by purchase, and hence simply claims ownership of them against the plaintiff, then the *hereditatis petitio* is not employed, but the *rei vindicatio* or *Publiciana* action: fr. 25. § 17. D. 5. 3; Const. 7. C. 3. 31; Const. 4. C. 7. 34.

⁷ fr. 10. § 1. D. 5. 3.

⁸ Const. 1. § 1. C. 3. 31. See fr. 25. § 11. fr. 40. § 1. D. 5. 3; § 2. I. 4. 17.

⁹ fr. 25. § 4. D. 5. 3; fr. 40. § 1. D. 5. 3; § 2. I. 4. 17.

4. The defendant, however, may have counter claims against the heir, which, in the case of the *bonæ fidei* possessor, are all his claims against the inheritance as a creditor,¹ and his costs and expenditures for the inheritance. If these were applied for the production of the accessions, then every defendant, be he *bonæ fidei* or *malæ fidei* possessor, may defalk such costs and expenditures to the extent that he is bound to restore.² If, on the contrary, the expenditures were applied to the substance of the inheritance, then the *bonæ fidei* possessor may claim reimbursement for all expenditures, even if they afterwards prove unavailing; the *malæ fidei* possessor may claim for the necessary expenditures, but for the useful expenditures he may claim only when the advantage thereby effected still exists; in regard to the voluntary expenses he has only a *jus tollendi* (the right to take back).³

5. The suit for the inheritance, according to the general rule of the prescription of actions, is extinguished in thirty years (§ 213, *supra*), and it is without reason when it is permitted to continue ninety years in the case of children called *ab intestato* to the paternal inheritance, and to children instituted by the testament, even one hundred years.⁴

2. Possessory Remedies.

§ 748. The possessory remedies include—

1. The interdict *quorum bonorum*, which he who accepted the *bonorum possessio* (§ 658, *supra*) may institute in order to be put into possession of the corporeal things of the inheritance against him who possesses the inheritance *pro herede* or *pro possessore*, or who has fraudulently ceased to possess it.⁵

2. That *missio in bona defuncti* (the placing into possession of a decedent's property), which the moderns term the remedy *ex lege ult. C. de edicto Divi Hadriani tollendo* (6. 33), by which he who was instituted heir by a written testament, whose external form is faultless and which has no patent defects, may require that he be placed in possession of the inheritance during the interim.⁶

3. Several other *missiones in possessionem bonorum defuncti*, which also give possession only in the interim of the inheritance (§ 659, *supra*), particularly

a. The *missio in possessionem ex edicto Carboniano*. If the right of inheritance of an estate leaver's child be contested by one who denies that it

¹ Const. 3. C. 3. 31.

² fr. 36. § 5. D. 5. 3; fr. 46. D. 22. 1.

³ fr. 38. 39. D. 5. 3.

⁴ Const. 3. C. 7. 39; *Unterholzner*, Verjährungslehre, Vol. 2, §§ 167, 168.

⁵ Gaius. IV. § 144; § 3. I. 4. 15; Dig. 43. 2; Cod. 8. 2; *Rogge*, Diss. proponens interpretationem L. I. D. quorum bonorum, Regiom. 1817.

⁶ Paul, III. 5. § 14-18; Novel Valentin. III. Tit. 20. c. 1. § 5; *Rosshirt*, Test. Erb-recht, Vol. 2, § 134.

is his child, such child may require the postponement of the suit till his pubescence, and under a curator's supervision till then the possession of the paternal inheritance and support thereout.¹

b. The *missio in possessionem, quæ ventri datur*. If a wife at the death of her husband allege that she is pregnant, she may also require the interim possession of the inheritance and support thereout, under the supervision of a curator, till she be confined or till it be ascertained that she is not pregnant.² And lastly, the *bonorum possessio, quæ furioso datur*,³ which has already been treated on at the end of § 736, *supra*.

II. RELATION OF THE CO-HEIRS BETWEEN THEMSELVES.

A. EACH ONE'S PART OF THE ASSETS AND DEBTS OF THE INHERITANCE

§ 749. If an inheritance be devolved to several and all acquire it, each co-heir obtains a part of all the property belonging to the inheritance in proportion to his share thereof. The debts and credits of the estate leaver are *ipso jure* divided among the co-heirs in proportion to the share of each (*nomina et debita hereditaria ipso jure inter coheredes sunt divisa*). By entry into the inheritance each co-heir acquires his distinct part, and may immediately without a division institute suit for his share against the debtors of the inheritance and be sued for his share by the creditors of the inheritance.⁴ The estate leaver may determine otherwise respecting his debts and credits, or the heirs may determine differently by convention among themselves; but in both cases, in respect to debts, this has binding force only between the heirs themselves. It does not bind the creditors, and they may sue each heir for his proportional part, but for no more, and in respect to creditors the change effected is to be decided by the rules on cession of claims.⁵

B. PARTITION OF THE INHERITANCE.

§ 750. Every heir, as against his co-heir, may require partition of the inheritance,⁶ provided that he has the right of disposition of his property and that it was not commanded by the estate leaver or agreed on by the heirs that the inheritance should remain for a time undivided.⁷

¹ Dig. 37. 10; Cod. 6. 17; *Fabricius*, Ursprung der bonorum possessio, p. 168, *seq.*

² Dig. 25. 5; 25. 6; 37. 9.

³ Dig. 37. 3; Const. 7. §§ 3. 8., C. 5. 70.

⁴ Const. 6. C. 3. 36. See fr. 25. § 13. D. 10. 2; Const. 1. C. 8. 36; Const. 1. C. 8. 32; Const. 26. C. 2. 3. Hence the credits and debts of the inheritance are not objects of the action *familiæ erciscundæ*: fr. 4. pr. fr. 25. § 1. D. 10. 2; *Crell*, De divisione nominum in judicio familiæ erciscundæ, Viteb. 1743.

⁵ fr. 3. pr. D. 2. 15; Const. 25. 26. C. 2. 3; fr. 2. § 5. fr. 3. fr. 25. §§ 1. 13. D. 10. 2; fr. 11. 14. D. 20. 5; fr. 69. § 2. D. 30. See fr. 14. D. 2. 15; and thereon see *Held*, Diss. ad L. 14. D. de transact. Leipsic, 1828.

⁶ See *supra*, note 4.

⁷ fr. 14. § 2. D. 10. 3; Const. 5. C. 3. 37.

1. The partition may be either extrajudicial by agreement of the heirs among themselves or by the aid of an umpire; or in the event of disputes among the heirs it may be judicial by the decision of the judge. For the latter purpose each heir has the action of partition (*actio familiæ erciscundæ*) against his co-heir.¹

2. In partition all the estate leaver's actual estate must be divided, after having separated from it what was not his or what must be restored to other persons, such as the specific property of the children and the *dos* of the estate leaver's wife. Certain things are excluded from partition, notwithstanding they may be the actual property of the estate leaver,² such as things which may readily inflict injury or which are contrary to good morals,³ and all documents and records, which must be given to him whose person or rights are affected thereby.⁴

3. The partition may be made in various ways, either by an actual division of physically divisible things among the co-heirs or by giving to one this thing for which another is to receive that thing—in both of these cases it is to be regarded as an exchange—or the inheritance property is wholly or partly given to a single heir, who thereupon must pecuniarily satisfy his co-heirs. In this case the partition is regarded as a sale,⁵ and the money, which one co-heir must pay the others for satisfaction, is at the present day termed heir-money (*pecunia hereditaria*). The property may also be sold to a third party and the proceeds divided.⁶ Whichever way the property be divided, it always presents a necessary alienation; hence it is permitted in cases where alienation is otherwise prohibited.⁷ Partition is also an onerous alienation, being subject to the obligation of warranty as in the case of sale or exchange.⁸

4. If in the division of the inheritance a co-heir be wholly passed over, he may contest such division, and either demand from the other co-heirs the

¹ § 4. I. 4. 17; §§ 3. 4. I. 3. 27. (28); Dig. 10. 2; C. 3. 36. 38; *Glück*, Vol. 11, § 725, seq.; *Mehl*, *Judicium familiæ erciscundæ*, Göttingen, 1780; *Martini*, *Diss. de hereditate plurimis communi*, Leyden, 1825.

² Prædial servitudes belonging to the inheritance, which being juridically indivisible are not in common, but belong primarily to each co-heir as a whole, are not entirely excluded from partition, still are not specially divided, and follow the land with which they are connected: fr. 23. § 3. fr. 25. D. 8. 3; fr. 4. § 3. D. 8. 5.

³ fr. 4. § 1. D. 10. 2; fr. 9. D. 49. 14.

⁴ fr. 4. § 3. fr. 5. fr. 8. D. 10. 2; Const. 2. C. 8. 32.

⁵ That is, it is an actual exchange if it be made by convention and a quasi exchange if made by juridical partition. The same rule holds as to sale.

⁶ Const. 3. C. 3. 37.

⁷ When an heir *sui juris* institutes an action for the partition of the inheritance, the juridical partition must be made, even if some of the other heirs are under guardianship; and if all the heirs be under guardianship, an official decree is given: fr. 1. § 2. D. 27. 9; Const. 17. C. 5. 71.

⁸ fr. 25. § 1. D. 10. 2; Const. 14. C. 3. 36; Const. 7. C. 3. 38. On the case when the estate leaver himself made the partition, see fr. 77. § 8. D. 31; *Glück*, *Comm.* Vol. 11, pp. 78, 107.

payment of his share or insist on a new partition.¹ If all the co-heirs participate in the partition, and one of them has suffered a wrong, then is to be distinguished—

a. When the estate leaver himself determined the property and its value which each co-heir was to receive for his part, in such case there may be a recovery only for an injury to the birthright portion.²

b. When the judge divided (*judicio familiæ erciscundæ*). If the decrees for partition have acquired the force of law it cannot be contested because of an inordinate injury to a co-heir.³

c. When the heirs have privately or with the aid of an umpire divided. The injured party may because of *dolus* (fraud) have an action for damages. But when there is no fraud, the heir has the right to dissolve the partition or sue for damages only when he has suffered an injury exceeding the half of his part, that is, when he has been compensated with money and did not receive the actual half (§ 406, *supra*).⁴

C. COLLATION.⁵

§ 751. When descendants inherit to their ascendants and by the modern law,⁶ whether it be *ex testamento* or *ab intestato*, they are reciprocally bound to collate, that is, they must return to the common inheritance certain gifts which they received from the estate leaver during his life to the extent that they were enriched thereby or must have themselves charged therewith on account of their shares.⁷ In which the law includes the *dos*, the *donatio propter nuptias*,⁸ the military commission⁹ purchased by the estate leaver,

¹ fr. 44. § 2. D. 10. 2; Const. 17. C. 3. 36; Paul, S. R. 1. 18. § 4. See fr. 2. § 4. D. 10. 2.

² Const. 10. 26. C. 3. 36; Novel 22. c. 48.

³ arg. fr. 56. D. 42. 1; fr. 25. D. 1. 5; fr. 207. D. 50. 17.

⁴ Const. 1. 3. C. 3. 38; Const. 2. C. 4. 44; Glück, Vol. 11, p. 93, *seq.*

⁵ Ulpian, XXVIII. § 4; D. 37. 6–8; Cod. 6. 20; Novel 18. c. 6; Novel 97. c. 6; *Fein*, Das Recht der Collation, Heidelberg, 1842; *Pfizer*, Über die Collation der Descendenten, Stuttgart, 1807; *Reinhardt*, Die Lehre von der Einwerfung, Stuttgart, 1818.

⁶ The duty of collation was first prescribed by the prætor on the introduction of the *bonorum possessio contra tabulas* and *ex edicto unde liberi*. In order that in this case the *emancipatus* should not have any advantage over the child or grandchild (*suus*) with whom he was called to the inheritance, the former was denied the actions, when he would not divide his own property, which would have belonged to the inheritance if he had been a *suus*, that is, if he had remained in the estate leaver's power till his death with that *suus* whose share was diminished by his competition. The collation imposed on the *emancipatus* was termed *collatio bonorum*: Dig. 37. 6; that imposed on the *sua, dotis collatio*: Dig. 37. 7.

⁷ He who does not become heir need not collate: fr. 9. D. 37. 7. Ascendants and brothers and sisters of the estate leaver need not collate to each other.

⁸ Const. 12. 16. 17. 19. 20. pr. C. 6. 20. If what was to be collated is lost without the heir's fault he is not bound to collate: fr. 2. § 2. D. 37. 6; Novel 97. c. 6.

⁹ Const. 20. pr. C. 6. 20.

and also, in a particular case, the simple gift between the living, namely, when such donee received a gift from the estate leaver which is not generally collated, and another descendant who is called to the inheritance with the donee has received such a gift but is obliged to collate it, in such case both gifts must be collated.¹ But the estate leaver may release any descendant, or all of them, from collating that which is generally collated, if the birthright portion be not diminished by it;² on the other hand, he may require the collating of that which usually need not be collated, provided it depend on his generosity and not on a legal obligation, as, for example, the usual nurture. The foregoing obligation to collate must have been imposed at the making of the gift, that is, the gift must have been made on condition that it was to be collated.³

D. RIGHT OF INCREASE (*jus accrescendi*).

1. General Principles.

§ 752. When one of several co-heirs ceases to be heir there accrues to the others the advantage or disadvantage of the right of increase (*jus accrescendi*), that is, the portion which becomes vacant on default of an heir accrues to the remaining heirs, according to their proportions of the inheritance.⁴ This right—

1. Takes place with testamentary and intestate heirs, whether the inheritance be conferred on them according to the civil or the prætorian law.⁵

2. It takes place only when the failing heir had no right of transmission, and with testamentary heirs only when the failing heir had no substitutes or such substitutes are lacking.⁶

¹ Const. 20. § 1. C. 6. 20; *De Man*, De donatione simplici jure Rom. non conferenda, Utrecht, 1804.

² Novel 18. c. 6.

³ Const. 20. § 1. in fin. C. 6. 20. See fr. 25. pr. D. 5. 2; Const. 35, § 2. C. 3. 28. If the collation be imposed by testament, then it must be determined by the rules on the burden of legacies and *fideicommissa*.

⁴ On the ancient law: Ulpian, tit. 17. 18. On the modern law: Dig. 28. 5; 29. 2; Cod. 6. 10. and 51. Literature: *Cujas*, Recit. ad Cod. Lib. 6, tit. 51; *Donellus*, Comm. jur. civ. Lib. 7, c. 12, 13; *Ludwig*, Diss. I. de jure accrescendi, Leipsic, 1817; *Baumeister*, Das Anwachsungsrecht, Tübingen, 1829; *Huidecooper*, Diss. de jure accrescendi, Utrecht, 1817; *Mayer*, Das Recht der Anwachsung, Tübingen, 1835; *Rosenthal*, Jus accrescendi, Leipsic, 1827; *Glasson*, Du droit d'accroissement, Paris, 1862; *Glück*, Vol. 43, p. 243, seq. See *K. A. Schneider*, Das alteivile und Justinianische Anwachsungsrecht, Berlin, 1837.

⁵ § 5. I. 3. 9. (10). Whether in the sale of an inheritance the right of increase conduces to the advantage of the vendor or the vendee? See fr. 2. §§ 1. 4. D. 18. 4. and thereon *Glück*, Comm. Vol. 16, p. 341; *Cucumius*, De jure accrescendi cui competat post hereditatem venditam, Wirceb. 1818; *Gerling*, Diss. de hereditate vendita, Utrecht, 1827.

⁶ Const. un. §§ 13. 14. C. 6. 51.

3. The testator cannot by his testament prohibit this right directly, but may do so indirectly by directing a substitution.¹

4. It arises of right without the knowledge and against the will of the remaining heirs,² so that the vacant portion does not require a particular acceptance, but accrues with all its burdens, so that the heirs to whom it falls must bear them.³

5. It does not accrue to them whose inheritance portion, whether it be *ab intestato* or *ex testamento*, is fixed by law at a certain absolute or relative maximum, when they have received such, but up to such maximum they have the right of increase.⁴

2. Right of Increase in Intestate Succession.⁵

§ 753. The right of increase arises in intestate inheritance succession when one of several heirs to whom the inheritance devolves ceases to be heir.⁶ This right arises as follows:

1. The vacant portion accrues to those who would have received it if he who ceased to be heir had never existed, in proportion to their respective shares of the inheritance.⁷

2. When the right of increase arises, that mode of succession which existed at the estate leaver's death continues among the remaining heirs.⁸

3. Right of Increase in Testamentary Inheritance Succession.

§ 754. In testamentary inheritance succession the right of increase among several co-heirs is founded on the rule that no one can die testate as to part and intestate as to part (*nemo pro parte testatus pro parte intestatus decedere potest*).⁹

1. It depends on the manner in which the heirs are connected.

a. They are either *re et verbis conjuncti* (thing and words connected), which now is also termed *mixtim conjuncti*, when they are named in the same sentence and are instituted either without designation of parts (*sine parte*), thus, "Titius and Sejus shall be heirs;" or are instituted together for a certain part without stating either's part, as for example, "Titius and Sejus shall be heirs for a half part."

¹ fr. 55. D. 30.

² fr. 31. fr. 55. pr. fr. 53. § 1. fr. 76. pr. D. 29. 2. This, however, has exceptions: fr. 55. 61. D. 29. 2.

³ fr. 61. § 1. D. 31; Const. 4. C. 6. 49; Const. un. §§ 4. 10. C. 6. 51.

⁴ For the cases in which this principle is applicable, see § 679, div. 2; § 703, div. 2-4, *supra*.

⁵ Glück, *Intestaterbfolge*, p. 147-157.

⁶ On the disputed relation between the *jus accrescendi* and the *successio graduum*, see § 671, div. 3, *supra*, note 1, p. 505.

⁷ fr. 12. pr. D. 37. 4.

⁸ Glück, *Intestaterbfolge*, p. 700, *seq.*

⁹ Hence the right of increase occurs *ipso jure* in the case of a military testament, but only when the soldier has expressly directed it; if he have not directed it, the vacant portion accrues to the intestate heirs: fr. 37. D. 29. 1; Const. 1. C. 6. 21.

b. They are *re tantum conjuncti* when each is instituted for one and the same portion of the inheritance, but each is named in a different sentence, as for example, "Titius shall be heir for a half part;" "Sejus shall be heir to the part to which Titius has been instituted heir."¹

c. Or they are *verbis tantum conjuncti* when they are named in the same sentence, but each is instituted for a certain portion of the inheritance, for example, "Titius and Sejus shall be heirs to equal parts;"² or they are neither *re conjuncti* nor *verbis conjuncti*, which may occur when the parts are determined, for example, "Titius shall be heir for one sixth;" "Sejus shall be heir for one fourth;" or when they are undetermined.

2. This right of increase also depends on who ceases to be heir:

a. The rule is that the vacant portion accrues to the remaining heirs in proportion to their parts of the inheritance.³

b. An exception arises when one instituted *re et verbis conjunctus* or a *re tantum conjunctus* ceases to be heir. In this case his portion accrues to those only who were *conjuncti* with him.⁴

SECTION FOURTH.

OF LEGACIES AND OF GIFTS IN THE EVENT OF DEATH.

SOURCES.—Gaius, II. § 101–289; Ulpian, XXIV. XXV.; Paul, III. 6; IV. 1; Inst. 2. 20–25; Dig. 29. 7; 30–35; 36. 1–4; 39. 6; Cod. 6. 36. 37. 42–54; 8. 56. (57).

LITERATURE.—*Donellus*, Comm. jur. civ. Lib. 8; *Cujas*, Recit. ad Dig. Lib. 30 and 31, in Vol. 7, p. 957, *seq.*, of his works; *Westphal*, Von Vermächtnissen und Fideicommissen, Leipzig, 1791, and his System der Lehre von den einzelnen Vermächtnisarten, etc., Leipzig, 1793; *Geyert*, Lehre von den Vermächtnissen, Frankfurt, 1829; *Rozzhirt*, Von den Vermächtnissen, Heidelberg, 1835; *Mayer*, Die Lehre von den Legaten und Fideicommissen, Part 1, Tübingen, 1854.

CHAPTER I.

OF CODICILS.

I. NATURE OF CODICILS.

§ 755. Every disposition by last will which is not a testament is termed a codicil (§ 684, *supra*).⁵

¹ Should it here be further stated "Sempronius shall be heir for the half part," then Titius and Sejus are instituted as *re conjuncti* to the one half and Sempronius to the other half: fr. 142. pr. D. 50. 16.

² § 8. 1. 2. 20; fr. 89. D. 32; fr. 142. D. 50. 16.

³ fr. 59. § 3. D. 28. 5; Const. un. § 10. C. 6. 51. But there is no increase for him who is instituted for a fixed part (*pars quantal*) or a certain thing till all the others cease to be heirs. See the literature cited end of note 4, p. 524, § 705, *supra*.

⁴ Const. un. § 10. C. 6. 51. See § 8. 1. 2. 20; fr. 15. pr. fr. 20. § 3. fr. 59. § 3. fr. 63. fr. 68. D. 28. 5; fr. 142. D. 50. 16; fr. 1. 11. D. 7. 2; *Glück*, Comm. Vol. 43, p. 303, *seq.* See *Baummeister*, *supra*, § 23–35; *Mayer*, *supra*, p. 215, *seq.*

⁵ Inst. 2. 25; Dig. 29. 7; Cod. 6. 36; *Donellus*, Comm. jur. civ. Lib. 7, c. 18, 19;

1. He only can make a codicil who is able to testamentate (§ 685, *supra*).¹

2. In a codicil neither the institution nor the exclusion of the indefeasible heirs, nor the substitution of direct heirs, can be made or revoked.² The testator, however, may first announce in the codicil the name of the heir instituted by the testament, and he may designate by the codicil the amount such instituted heir shall have.³ All other dispositions permissible in the event of death, such as legacies and *fideicommissa* of every kind, may, on the contrary, be made by codicil as well as by testament (§ 719, *supra*).

3. Several codicils may be made, all of which will be valid.⁴ If, however, the terms of a later codicil conflict with those of an earlier one, the earlier one is thereby revoked.⁵

II. THE KINDS OF CODICILS.

§ 756. Every codicil presumes a direct succession of the heir to the estate. As the succession is either testamentary or intestate, so—

1. Codicils are either *codicilli ab intestato facti* (codicils made without a testament), which are made by an estate leaver who makes no testament (these stand and fall by themselves),⁶ or *codicilli ad testamentum facti* (codicils made to a testament), which a testator makes in addition to his testament. If such codicils be expressly confirmed in the testament, which may be done in respect to codicils made or to be made,⁷ they are termed *codicilli testamento confirmati* (codicils confirmed by the testament).⁸ All codicils to a testament are to be regarded as part of the testament, wherefore they stand and fall and revive with it.⁹

Glück, Comm. Vol. 44, § 1509, *seq.*; Vol. 45, § 1513 b, *seq.*; *Mayer*, *supra*, § 18–28. On the history of this doctrine, see *Hugo*, Rechtsg. p. 768. See note 1, § 757, *supra*.

¹ fr. 6. § 3. fr. 8. § 2. D. 29. 7; fr. 2. D. 30; Const. 5. C. 6. 36; *Glück*, Vol. 44, p. 30, *seq.*

² § 2. I. 2. 25; fr. 2. § 4. fr. 10. D. 29. 7; Const. 2. 7. C. 6. 36; *Glück*, Vol. 44, p. 75.

³ That is, the estate leaver may say, "I institute him as my heir whom I will name in the codicil," and "A. shall be my heir for the part which I will designate in the codicil." fr. 36. 77. D. 28. 5.

⁴ § 3. I. 2. 25; fr. 6. § 1. D. 29. 7.

⁵ Const. 3. C. 6. 36.

⁶ fr. 3. pr. fr. 8. § 1. fr. 16. D. 29. 7; *Glück*, Comm. Vol. 44, p. 150, *seq.*

⁷ On the confirmation of a codicil in a testament made contemporaneous with it, see fr. ult. D. 29. 7; *Glück*, Comm. Vol. 44, p. 226, *seq.*

⁸ These alone appear to have had legal effect still at the time of the younger Pliny: *Glück*, Vol. 44, p. 19, *seq.*

⁹ fr. 2. § 2. fr. 3. § 2. fr. 8. pr. fr. 14. pr. fr. 16. in fin. D. 29. 7; *Glück*, p. 146, *seq.*; 193, *seq.* The codicils made before the testament continue valid without special confirmation, when it is certain that the testator has not changed his mind: § 1. I. 2. 25. On the relation of this passage to fr. 5. D. 29. 7, see *Glück*, p. 168, *seq.*

III. THE FORM OF CODICILS.¹

§ 757. A codicil may be made verbally or in writing.² By the ancient law no particular form was required.³ But the modern law requires an external form, and distinguishes as follows:

1. A codicil made under public authority (§ 690, *supra*) needs no other formalities.⁴

2. If one be authorized to make a privileged testament, the testamental form is operative for the codicil.⁵

3. Generally every private codicil must be attested by five witnesses,⁶ who must possess the requisites specified in § 692, *supra*, for being testamental witnesses.⁷ They must be requested to witness the codicil,⁸ and if it be in writing they must subscribe it and subseal it.⁹ In regard to the subscription by the codicillor the same rules apply as in the case of written testaments (§ 693, *supra*).¹⁰ In the making of a codicil the unity of the transaction must be observed.¹¹

¹ See the writings cited note 1, § 755; *Glück*, *Comm.* Vol. 44, § 1512, Vol. 45, § 1513 g.

² *fr.* 5. § 1. D. 42. 1; *Const.* 13. C. 1. 2.

³ Thus it is according to Justinian's Pandects: *Glück*, *Comm.* Vol. 44, p. 339-365. Constantine prescribed for intestate codicils the same form as for testaments: *Const.* 1. C. Th. 4. 4. (See *Const.* 2. *Ib.* of Valentinian, Theodosius and Arcadius.) Theodosius II. extended this prescript to all other codicils: *Const.* 7. end of § 2. *Ib.* After this in private codicils one had generally the choice between the civil form, which required five, and the prætorian form, which required seven, witnesses, till a later ordinance of Theodosius II. (*Nov. Theod.* tit. 16. or *Const.* 21. C. Just. 6. 23) made new provisions in the regular form of private testaments, which Justinian perfected (especially in *Const.* 28-30. C. Just. 6. 23. and in *Novel* 119. c. 9). In relation to these changes in the doctrine of testaments Justinian adopted the Theodosian *Const.* 7. end of § 2, above cited, on codicils, as *Const.* 8. § 3. C. Just. 6. 36, with modifications, in consequence of which private codicils now regularly require but five witnesses: *Glück*, Vol. 44, p. 365, *seq.*

⁴ *Glück*, Vol. 45, p. 37-42.

⁵ *Glück*, Vol. 44, p. 42, *seq.*

⁶ According to the general ordinance in *Const.* 8. § 3. C. 6. 36, five witnesses are required to all codicils, hence to a codicil confirmed by a testament. See *Glück*, Vol. 45, p. 79, *seq.*

⁷ According to § 11. I. 2. 10, there is no doubt that legatees and *fideicommissaries* may be witnesses to a codicil: *Glück*, Vol. 44, p. 455, *seq.*

⁸ *Glück*, Vol. 44, p. 421, *seq.*

⁹ *Const.* 8. § 3. C. 6. 36. According to *Const.* 8. C. 6. 22, the same special formalities are to be observed in a blind person's codicil as in a blind person's testament (§ 695, *supra*). Therefore, in addition to the five witnesses, there must also be a notary: *Glück*, Vol. 34, p. 39, *seq.*; Vol. 44, p. 401; Vol. 45, p. 75; *Mayer*, *supra*, p. 78. On the written private codicils of those who cannot write, see *Glück*, Vol. 45, p. 560, *seq.*

¹⁰ *Const.* 28. § 1. C. 6. 23. According to the common opinion the codicillor's signature is not requisite, because of *fr.* 6. §§ 1. 2. D. 29. 7; but this passage contains the ancient law: *Glück*, Vol. 45, p. 4-21.

¹¹ *Const.* 8. § 3. C. 6. 36; *Glück*, Vol. 44, p. 469; Vol. 45, p. 4.

4. By Justinian's latest ordinance a legacy or *fideicommiss* may be left without any form by a simple request to the heir, but he who is benefited can prove it only by tendering the oath to him who is burdened with the payment.¹

IV. CODICILLARY CLAUSES.

A. NATURE.²

§ 758. Since there are less formalities to be observed in a codicil than in a testament, and since, in the contents of a codicil, there is naught so essential as the naming of a direct heir and the proper regard to the indefeasible heirs in a testament, hence it is possible that a disposition by last will, which, according to the estate leaver's original intention, should have been a testament, but has not the requisites of a testament, may yet have the requisites of a codicil. Where this occurs the disposition by last will is sustained, if the testator have expressly declared that if his testament as such cannot be legally sustained, then he desires it to be sustained as a codicil. This is now termed the *clausula codicillaris*.³

B. EFFECT OF CODICILLARY CLAUSES.⁴

§ 759. A codicillary clause is unnecessary when every requisite for a testament has been observed. If such should not be the case, then either the requisite formalities of a codicil have been observed or they have not. In the latter case the clause has no effect;⁵ in the former case, however, it operates that the testament shall be regarded as a codicil and its provisions sustained as *fideicommissa*.⁶

1. If there be an earlier valid testament, then the inheritance is conferred on the heir instituted in such testament, as the direct heir;⁷ but he must restore it as a *fideicommissary* inheritance to him who has been instituted in the new testament containing the codicillary clause.

2. But if there be no valid earlier testament, then the inheritance de-

¹ Const. 32. C. 6. 42; § 12. I. 2. 23. See § 761, *infra*.

² Stryk, De clausula codicillaris in his diss. jurid. Frankfort, Vol. 1, No. 18; Tauchert, Diss. de clausula codicillari, Halle, 1825; Seuffert, Bemerkungen, über die Codicillar-Clausel, Würzburg, 1828; Glück, Vol. 45, § 1514, *seq.*

³ fr. 29. § 1. D. 28. 1. See fr. 88. § 17. D. 31; Const. 8. § 1. C. 6. 36. This clause is not expressly mentioned, but follows from fr. 1. D. 29. 7. fr. 41. § 3. D. 28. 6. compared with fr. 29. pr. D. 28. 1. See Glück, Vol. 45, pp. 191, 252, *seq.*

⁴ Glück, Comm. Vol. 45, § 1515.

⁵ If the testator have not the capacity to make a testamentary disposition, then the clause is also inoperative. Hence an inofficious testament, according to the Pandects, because of the legal presumption of the testator's insanity, cannot be sustained by a codicillary clause: fr. 13. D. 5. 2; Glück, Vol. 45, p. 344, *seq.*

⁶ fr. 2. § 4. D. 29. 7; fr. 88. § 17. D. 31.

⁷ Because of § 7. I. 2. 17; fr. 2. D. 28. 3; Const. 27. C. 6. 23.

ascends directly to the intestate heirs, who must restore it as a *fideicommissa*. In either case the direct heir has generally the right to the *quarta Fulcidia* and *Trebelliana*.¹

3. If, however, a testament has a codicillary clause, then the heir instituted therein must elect whether it shall be sustained as a testament or as a codicil. If the heir have elected he cannot change such choice; but the parents, the agnatic descendants of the estate leaver to the fourth degree, and the cognatic descendants to the third degree, all of whom were instituted in the testament, and who in the beginning maintained the validity of the last will as a testament, but whose claims under it were rejected or withdrawn, are permitted to maintain its validity as a codicil. But if they originally declared that the last will was a codicil, then they cannot subsequently claim that it be sustained as a testament.²

CHAPTER II.

OF SINGLE LEGACIES AND FIDEICOMMISSA (*legata et fideicommissa singularum rerum*).³

I. NATURE OF LEGACIES AND FIDEICOMMISSA GENERALLY AND OF SINGLE LEGACIES AND FIDEICOMMISSA ESPECIALLY.

§ 760. All unilateral dispositions by last will whereby on the death of the disposer one acquires interests in property otherwise than by direct institution as heir are termed legacies or *fideicommissa*. They always presume a direct inheritance succession, and contain burdens which are imposed either on the direct heirs or on others for whom provision is made in the event of death, so that three persons necessarily appear, the donor, the beneficiary and the burdened. The ancient civil law recognized only such legacies as were mandatorily imposed by the testament on the direct testamentary heir (*verbis directis et imperativis*), and these were termed *legata*.⁴ At the time of Augustus a customary law developed itself whereby naked wishes expressed to a direct heir or to another person as above mentioned, in a testament or otherwise (*codicillus*), had to be regarded, and such legacies (*verbis precativis*, precatory words) were termed *fideicommissa*.⁵ The distinctions

¹ Const. 29. C. 6. 42. See Const. 9. 10. C. 6. 21; Const. 1. C. 6. 36; *Franchs*, *Motherbearecht*, §§ 23, 33.

² fr. 2. § 4. D. 29. 7.

³ Const. 8 pr. §§ 1. 2. C. 6. 36.

⁴ See the works cited § 755, *supra*, especially Inst. II. 20-24; Dig. 30. 31. 32; Cod. 6. 37. 42. 43.

⁵ § 1. 1. 2. 20. fr. 116. pr. D. 30. fr. 36. D. 31.

⁶ The Latin and English languages have no common substantive for legacies and *fideicommissa* like the German *Vermächtniss*, though in Latin *relinquere* is used for both, e. g., fr. 5. pr. D. 31; fr. 14. § 3. D. 34. 1.

between legacies and *fideicommissa*,¹ which partly affect their provisions² and partly their operation, were much diminished in the course of time. The latter were abrogated by Justinian so that by his law the operation is always the same whether a legacy or *fideicommiss* is given mandatorily or petitorily.³ Respecting the objects there is a distinction between universal and single legacies and *fideicommissa*. The former (the *fideicommissum hereditatis* and *legatum partitionis*) relate to an entire inheritance or a part thereof, and, according to the modern law, lead to a succession *per universitatem*. The latter (*legata et fideicommissa singularum rerum*) have another object, and, according to the difference of their subjects matter, create different legal effects; but if they lead to a succession, then it is not a universal succession, but only a single succession. This chapter treats of single legacies and *fideicommissa*.

II. OF THE FORMATION OF LEGACIES AND FIDEICOMMISSA.

§ 761. Legacies and *fideicommissa* may be left in every valid last will, be it a testament or a codicil (§ 755, *supra*). Particularly noteworthy is an ordinance of Justinian⁴ by which every legacy or *fideicommiss* shall be valid, even if it should be wholly without form, provided it be in a written or verbal declaration to the burdened, but only when the beneficiary proves it by the oath of the burdened. The moderns term this a *legatum s. fideicommissum heredi præsenti injunctum*.⁵ If the beneficiary desire to prove it otherwise, then he is entitled to the legacy only when it has been set out in a formal testament or codicil, though doubtless in this case also proof might be made by the oath of the burdened.⁶

III. OF THE PERSONS CONNECTED THEREWITH.

§ 762. Respecting the persons connected with legacies and *fideicommissa* there is to be remarked—

1. Only those who have testamentability active (§ 685, *supra*) may create a legacy or *fideicommiss*.⁷

¹ See Gaius, II. § 190–289; Ulpian, tit. 24. and 25; Paul, III. 6; *Donellus*, Comm. jur. civ. Lib. 8, c. 2; *Van de Wynpersse*, Diss. jur. ad locum juris romani qui est de fideicommissis, Leyden, 1822; *Felsecker*, De exequatione legator et fideicommissor. Bamb. 1827; § 6, *seq.*

² After *fideicommissa* became legally binding, legacies could be given by codicils, but only in codicils confirmed by testaments, till Justinian abolished all distinctions.

³ Const. 1. 2. C. 6. 43; § 3. I. 2. 20; fr. 1. D. 30; *Felsecker*, *supra*, § 27, *seq.*

⁴ Const. 32. C. 6. 42; § 12. I. 2. 23; Const. 13. C. 4. 1.

⁵ *Süptitz*, Über den Beweis eines dem Fiduciare vom Testirer mündlich auf gelegten Fideicommisses, Braunschweig, 1804.

⁶ *Pufendorf*, Vol. 1, Obs. 138; *Koch*, Bonorum possessio, p. 246.

⁷ fr. 2. D. 30; fr. 114. pr. § 1. D. 30.

2. Only those who have testamentability passive (§ 703, *supra*) may accept such.¹

3. The burden of a legacy or a *fideicommiss* may now be imposed on any one who has received property out of the decedent's estate.² But generally no more can be imposed on him than he receives.³ If the testator did not specially designate who was to discharge the legacy or *fideicommiss*, then it is to be regarded as being imposed on the heir, and of several heirs each is bound according to his inheritance portion for each legacy or *fideicommiss* when the testator did not specially impose the several legacies or *fideicommissa* on the several heirs.⁴

4. But the heir cannot be bound to pay himself a legacy or *fideicommiss*.⁵ If, therefore, there be several heirs, and a part of the entire inheritance be given in advance (*prælegatum*) to one of them, then only that part thereof is validly given to him which the co-heirs must contribute according to their inheritance portion, but not the remainder, which the heir would have to pay himself in proportion to his share of the inheritance, because this he takes as heir, unless he has such co-legatees as have the right of increase (§ 770, *infra*). If they have not such right, the part they would have taken accrues to him.⁶

IV. OF THE OBJECTS OF LEGACIES AND FIDEICOMMISSA.

A. IN GENERAL.

§ 763. Everything which generally may be the object of a legacy or *fideicommiss* may be the object of an obligation.⁷ Those things are incapable of

¹ This did not originally apply to *fideicommissa*: Gaius, II. 284, *seq.* But see Ulpian, XXV. § 6.

² § 24. I. 2. 20. Aliment, however, may be left to an incapable person: fr. 11. D. 34. 1. On *posthumi*, see § 703, *supra*, note 5, and on corporations, fr. 20. D. 34. 5. See Const. 8. C. 6. 24. On the question, at which time the legatee must be capable? see *Schroeter*, *Observ. jur. civ.* Jena, 1826, Obs. 6.

³ Formerly a legacy could be imposed only on the direct testamentary heir: Ulpian, XXIV. § 20.

⁴ § 1. I. 2. 24; fr. 15. D. 29. 7; fr. 114. § 3. D. 30; fr. 1. § 6. D. 32; fr. 1. § 17. fr. 17. § 2. D. 36. 1.

⁵ fr. 33. pr. D. 31; Const. un. § 8. C. 6. 51.

⁶ fr. 116. § 1. D. 30.

⁷ fr. 76. § 1. fr. 86. fr. 91. D. 35. 2; fr. 18. § 3. D. 36. 1; fr. 34. § 12. D. 30; fr. 75. § 1. D. 31. On the whole doctrine, see *Voorda*, *Interpret. et emend. jur. Rom.* Lib. 2, c. 2-5; *B. G. Pfeiffer*, *De prælegatis*, Marb. 1798; *Nettelbladt*, *Der Lehre von den Prælegaten*, Rostock und Leipzig, 1802; *Hjorden*, *Diss. de prælegatis*, Erlangen, 1832; *Buchholz*, *Die Lehre von den Prælegaten*, Jena, 1850.

⁸ This was always applicable to *fideicommissa*, but as to legacies it originally depended on their form. An ordinance of Constantine's sons prescribed that they should no longer depend on their ancient form: Const. 21. C. 6. 37. But if there

being such objects as the legatee cannot acquire,¹ and which belong to him at the making of the legacy or *fideicommiss*.² On the other hand, these may be bequeathed :

1. Things, and acts to be performed for the legatee.³

2. Things present as well as future ; but there must be a hope that the latter will come into existence.⁴

3. Single things and certain sums, as well as entireties. If a certain sum of money or a quantity of fungible things be given, then it is termed a quantitative legacy.⁵ A species thereof is a legacy or *fideicommiss* of an annual or periodical rent,⁶ which has the characteristic that every period thereof is to be regarded as a separate legacy.⁷

4. The testator's property, as well as property belonging to the heirs⁸ or to a third person, may be given ; he who is to discharge the legacy must strive to purchase the latter and deliver to the legatee, and, when this is impossible, to pay the value thereof ; provided, however, that the testator knew that the property which he bequeathed was another's ; if he did not know this, then generally the legacy is invalid.⁹

5. Corporeal and incorporeal things may be the object of a legacy (§ 764, *infra*).

were any remaining distinction between legacies and *fideicommissa* (which was the case as to universal legacies and *fideicommissa*), such distinction was abrogated by Justinian's ordinances (see § 760, note 3, p. 572).

¹ § 4. I. 2. 20 ; fr. 49. § 2. D. 31 ; fr. 41. § 1. D. 30. Excepting, however, things belonging to a third person, which the legatee is not permitted to acquire, fr. 40. D. 30, as also things which not for legal but for factual reasons are out of commerce : fr. 114. § 5. D. 30. In both of these cases the value must be paid : *C. E. Francke*, De legato rei commercio exemptæ, Viteberg. 1788 ; *J. C. C. Glück*, Comm. ad fr. 49. § 2. de leg. II. Erlangen, 1817 ; *Roszhirt*, *supra*, Vol. 1, p. 224, *seq.*

² § 10. I. 2. 20. There is an exception when the thing is given conditionally and is alienated at the time of the performance of the condition : fr. 41. § 2. D. 30 ; fr. 1. § 2. D. 34. 7 ; fr. 98. D. 35. 1.

³ arg. § 14. I. 2. 20 ; fr. 114. § 14. D. 30. Only they must be such as one can be bound to perform : fr. 12. D. 32 ; fr. 112. § 14. D. 30 ; and the performance of which would be beneficial to the legatee : fr. 114. § 14. D. 30.

⁴ § 7. I. 2. 20 ; fr. 24. pr. D. 30 ; fr. 17. D. 32.

⁵ fr. 34. §§ 3. 4. D. 30 ; Dig. 33. 6 ; *Roszhirt*, *supra*, Vol. 2, p. 73, *seq.*

⁶ Dig. 33. 1. On the legacy of alimentation, see Dig. 34. 1 ; *Roszhirt*, Vol. 2, p. 81, *seq.*

⁷ fr. 10. D. 36. 2 ; fr. 4. D. 33. 1. See § 767, *infra*.

⁸ The heir must perform this and is not released by tendering the value : fr. 71. § 4. D. 30 ; Const. 25. C. 6. 42 ; *Roszhirt*, Vol. 2, p. 137.

⁹ § 4. I. 2. 20 ; § 1. I. 2. 24 ; Const. 10. C. 6. 37 ; fr. 57. D. 30. On the case where the legatee acquires during the testator's life the property of a third person bequeathed to him, see § 6. I. 2. 20 ; *C. A. Gottschalk*, Diss. de legato rei alienæ Dresden, 1800 ; *Roszhirt*, Vol. 2, p. 148, *seq.*

B. LEGACIES AND FIDEICOMMISSA OF INCORPOREAL THINGS.

§ 764. In legacies and *fideicommissa* of incorporeal things are included—

1. The legacy of a claim (*legatum nominis*), when the estate leaver leaves to one a claim which he or his heirs have on a third person.¹
2. The legacy of a release (*legatum liberationis*), when the estate leaver releases to one a debt which he owes to the estate leaver, or to his heir, or to a third person.²
3. The legacy of a debt (*legatum debiti*), when the estate leaver leaves to his creditor what is due to him. This is valid if it be in anywise serviceable to the legatee.³
4. The legacy or *fideicommiss* of a personal or prædial servitude (§ 322, *supra*).⁴
5. The legacy or *fideicommiss* of a pawn (§ 339).⁵

C. LEGACIES OF SPECIES AND OF CLASS (*speciei et generis*).

§ 765. If the thing which is the object of a legacy be individually designated, then it is a legacy of a species; if, however, it be designated by its class and do not belong to the things which may be weighed, numbered or measured, then it is a legacy of a class (§ 161, *supra*). The latter is invalid if the class be so general as to include wholly useless things, or if the estate leaver do not leave things of the class and do not direct that things of the prescribed class shall be procured for the legatee.⁶ But should there be in the estate things of the class bequeathed, then he to whom the testator gave the choice chooses them. When the choice is given to the legatee himself, it is termed an elective legacy (*legatum optionis s. electionis*),⁷ and then the legatee may choose the best thing; but if the heir have the choice for him, he cannot choose the worst.⁸ If the testator have not expressly given the

¹ § 21. I. 2. 20; fr. 44. § 6. D. 30. However, if the claim do not exist, or if it ceased to exist during the testator's life, then the legacy is invalid, excepting if the claim or debt should be designated only as a case of demonstration: § 21. I. 2. 20; fr. 75. §§ 1. 2. D. 30; fr. 96. pr. D. 30; fr. 27. § 2. D. 32; *Hauhold*, De legato nominis, Leipsic, 1793.

² § 13. I. 2. 20; fr. 3. § 3. fr. 25. D. 34. 3. On fr. 25. see *Cujas*, ad L. 25. D. de liberat. leg. in Lib. 10. quæst. Pauli, in his works, Vol. 2, p. 1141; *Arndts*, Diss. ad L. 25. D. de liberatione legata, Berlin, 1825; *Rosshirt*, Vol. 2, p. 276.

³ §§ 14. 15. I. 2. 20; fr. 4. D. 37. 7; fr. 84. § 6. D. 30; fr. 82. pr. fr. 85. D. 31; Const. un. § 3. C. 5. 13; *J. G. Müller*, De legato debiti, Leipsic, 1788; *Rosshirt*, Vol. 2, p. 304.

⁴ § 1. I. 2. 4; § 4. I. 2. 3; Dig. 33. 2. and 3. See *Rosshirt*, Vol. 1, p. 297.

⁵ fr. 26. pr. D. 13. 7; *Rosshirt*, Vol. 2, p. 209, *seq.*

⁶ fr. 71. pr. D. 30; fr. 69. § 4. D. 23. 3.

⁷ Formerly this was regarded as conditional, but it was changed by Justinian: § 23. I. 2. 20. See § 767, *infra*.

⁸ § 23. I. 2. 20; fr. 2. D. 33. 5; fr. 110. D. 30; *Andreas*, Diss. de legato optionis, Leipsic, 1798.

choice to any one, then, by the Justinian law, the legatee generally chooses; but the heir, like the debtor in obligations generally, has the choice only when it affects a third person's property. In the former case the legatee cannot choose the best thing, and in the latter case the heir cannot choose the worst.¹

V. OF THE MANNER IN WHICH A LEGACY OR FIDEICOMMISS MAY BE GIVEN.

§ 766. Legacies or *fideicommissa* may be conditional and unconditional. Every lawful condition is permitted, hence a resolutive (dissolving) condition is permitted, but a *captatorial* condition (for the benefit of a legacy hunter) is forbidden in this case, as it is in the institution of heirs.² But by the Justinian law it is permitted to impose a legacy or *fideicommiss* on the heir or on a beneficiary, as a penalty for the non-performance of a certain legal act, or the performance of a certain illegal act (*legatum pœnæ nomine ad coërcendum heredem relictum*).³ A legacy or *fideicommiss* may be made dependent on time (*sub die*), whether the time be certain or uncertain, and whether it be annexed for the beginning or the end of the right of the legatee;⁴ it may also be made dependent on a cause, manner or designation (*sub causa, sub modo or sub demonstratione*).⁵ A legacy or *fideicommiss* may no more be made to depend on the will of a third person than may the institution of an heir,⁶ nor may it depend on the will of the burdened more than may any other claim depend on the will of the debtor.⁷

¹ § 22. I. 2. 20. See fr. 20. fr. 37. pr. fr. 108. § 2. D. 30; fr. 2. § 1. D. 33. 5; *G. Francke*, *Observat. de jure legatorum et fideicommissorum*, Obs. 1, Jena, 1832; *Roszirt*, Vol. 2, p. 6, *seq.*

² fr. 64. D. 30.

³ There belong to the *pœnæ nomine relictæ*, which before Justinian were invalid, the completed nomination of a co-heir or co-legatee: § 36. I. 2. 20; Dig. 34. 6; Const. un. C. 6. 41; Ulpian, XXIV. § 17; Gaius, II. § 235; *Sammet*, *Diss. de legatis pœnæ nomine*, Leipsic, 1784; *Mercus*, *Diss. de legatis pœnæ nom. relictis*, Leyden, 1807; *Roszirt*, Vol. 1, p. 367, *seq.*

⁴ Hence it may be left *ex die certo* and *ad diem*, which is not permissible in the institution of an heir (§ 705, *supra*). The *dies incertus a quo* (uncertain time of beginning) is regarded as a condition: fr. 75. D. 35. 1; fr. 4. pr. fr. 21. pr. fr. 22. pr. D. 36. 2; fr. 49. § 1-3. D. 30; excepting if it be the day of the death of the beneficiary, and also if the right to the legacy be not made dependent thereon, but only that the payment of the same shall be made on an event that must occur: Const. 3. 5. C. 6. 53. See note 5, § 767.

⁵ Dig. 35. 1. On the cause: § 31. I. 2. 20; fr. 17. §§ 2. 3. fr. 72. § 6. D. 35. 1. On the *modus*: fr. 17. § 4. D. 35. 1.

⁶ See § 705, *supra*, note 8; fr. 43. § 2. fr. 75. pr. D. 30; fr. 1. D. 31; fr. 11. § 7. D. 32; fr. 52. D. 35. 1; fr. 46. pr. § 1-5. D. 40. 5.

⁷ fr. 46. § 4. D. 40. 5. See fr. 8. D. 44. 7; fr. 17. fr. 46. § 3. fr. 105. § 1. D. 45. 1.

VI. OF THE ACQUISITION OF LEGACIES AND FIDEICOMMISSA.

A. WHEN DO LEGACIES AND FIDEICOMMISSA VEST AND BECOME PAYABLE?

§ 767. *Dies legati cedit* signifies that the legatee has acquired the right to the inheritance, so that from this moment he can transmit it to his heirs. *Dies legati venit* signifies that the legatee is entitled to demand the payment of the legacy.¹ In relation to the question, When does the legacy vest or become payable (*Quando dies legati cedit aut venit*)? it is necessary to distinguish:

1. The right to unconditional legacies and *fideicommissa*, should they also be left *sub modo* (under a manner), *sub conditione resolutive* (under a condition of release), *in diem* (in time) and *ex die certo* (from a certain day), is acquired by the legatee (*dies legati cedit*) at the moment of the estate leaver's death,² unless the legacy or *fideicommissum* be such as does not vest in the legatee's heirs, *e. g.*, the legacy of the usufruct, in which case the legatee acquires it at the moment when the heir acquires the inheritance.³ Suit for the payment of the legacy cannot be instituted (*dies legati venit*) till the heir has acquired the inheritance, and if it be a legacy to vest on a certain day (*ex die certo relictum*), till the day has arrived.⁴

2. But in the case of a legacy or *fideicommissum* bequeathed on a suspensive condition or at an uncertain time (*ex die incerto*), the vesting of the legatee's right depends on the performance of the condition or the arrival of the day,⁵ unless the payment of the legacy, but not its vesting, is made to depend on the arrival of the day.⁶ But the legatee can only demand the legacy or *fideicommissum* when the heir has acquired the inheritance.⁷

3. In the case of an annual legacy (*annuo legato*), which is unconditional only in regard to its beginning, the first period of payment vests at the moment of the estate leaver's death, but each succeeding period vests only when the legatee survives its beginning; and in such case the whole period vests in him and is transmitted to his heirs.⁸

B. ACQUISITION OF THE RIGHTS WHICH ARE THE OBJECT OF THE LEGACY OR FIDEICOMMISSUM.

§ 768. The acquisition of the right to the legacy or *fideicommissum*, on which its transmission depends, differs from the acquisition of the rights which form

¹ Dig. 36. 2; Cod. 6. 53; fr. 213. pr. D. 50. 16.

² fr. 5. § 1. fr. 21. pr. D. 36. 2; Const. un. §§ 1. 5. C. 6. 51.

³ fr. 2. 3. 8. D. 36. 2; fr. un. § 2. D. 7. 3. Excepting the legacy of the labor of slaves and animals: fr. 2. D. 33. 2. See § 313, *supra*.

⁴ fr. 32. pr. D. 31; fr. 21. pr. D. 36. 2.

⁵ fr. 5. § 2. D. 36. 2; Const. un. § 7. C. 6. 51; fr. 1. § 14. D. 36. 3; fr. 4. pr. fr. 21. pr. fr. 23. pr. D. 36. 2; fr. 49. § 1-3. D. 30. See § 766, note 4.

⁶ Const. 3. 5. C. 6. 53.

⁷ fr. 32. pr. D. 31.

⁸ fr. 4. fr. 8. D. 33. 1; fr. 12. pr. § 1. fr. 23. D. 36. 2. See notes 6, 7, p. 574, *supra*.

the object of the legacy or *fideicommiss*. The legatee acquires the legacy or *fideicommiss* when the day upon which it is to vest has arrived, even without the legatee's knowledge or acceptance.¹ The legatee or *fideicommissary*, or his heirs, may renounce it, in which case he is regarded as if he had never had a right thereto.² As to the acquisition of those rights which the legatee or *fideicommissary* obtains through the legacy or *fideicommiss*, there are the following distinctions:

1. The property in the thing bequeathed generally vests in him by transfer from the burdened, and it is only in the case of legacies or *fideicommissa* of specific things belonging to the estate leaver³ that he becomes the owner, as of course, as soon as the inheritance has been entered into.⁴
2. The *jus in re* bequeathed to him in the estate leaver's property also vests in him, as of course, as soon as the inheritance has been entered into.
3. But a claim bequeathed to him vests in him only by cession by the heirs, besides which he has a *utilis* action.⁵
4. When the whole or part of the inheritance is bequeathed to him, he acquires primarily only a claim against the heir for its delivery.⁶

C. THE LEGATEE'S AND FIDEICOMMISSARY'S LEGAL REMEDIES.

§ 769. When the legatee or *fideicommissary* has acquired the right to the legacy or *fideicommiss*, and the day has arrived when he can demand it, the law gives him the following actions to obtain it:

1. A personal action against the heir, which arises *quasi ex contractu* from the heir's entry into the inheritance;⁷ this action is for the payment of the legacy or *fideicommiss*, and at the present day is termed action *legati*, or, when the heir is testamentary, action *personalis ex testamento*.⁸ It also lies against every validly burdened person.⁹
2. The action *hypothecaria*, in consequence of his legal hypotheca for the security of his legacy or *fideicommiss* (§ 345, *supra*), against every possessor of the objects out of which the legacy or *fideicommiss* is to be paid.¹⁰

¹ fr. 81. § 6. D. 30; fr. 75. § 1. fr. 80. D. 31; Const. 6. C. 6. 53. Excepting if it be left expressly on the condition "if he will," in which case he does not acquire it till he has declared his acceptance: fr. 65. § 1. D. 30; fr. 69. D. 35. 1.

² fr. 44. § 1. fr. 38. § 1. fr. 86. § 2. D. 30. But he cannot accept one part and reject the other: fr. 38. pr. D. 30; fr. 4. 58. D. 31.

³ The legacy of a quantity creates a claim for the transfer only, even when there are things of the kind in question in the inheritance; the case is otherwise with the legacy of a class.

⁴ fr. 80. D. 31; fr. 64. D. 47. 2; fr. 69. pr. fr. 86. § 2. D. 30; fr. 26. pr. D. 33. 2.

⁵ § 21. I. 2. 20; fr. 44. § 6. fr. 75. § 2. D. 30.

⁶ See the next chapter.

⁷ See § 740, *supra*, note 10.

⁸ § 5. I. 3. 27. (28); § 2. I. 2. 20; fr. 69. § 5. fr. 82. pr. D. 30; fr. 29. § 3. D. 32; fr. 75. D. 35. 2.

⁹ Const. 1. C. 6. 43.

¹⁰ Const. 1. C. 6. 43.

3. The *rei vindicatio* against every possessor of the testator's property bequeathed to him (§ 768, *supra*), and the *confessoria* action against every one who obstructs him in the enjoyment of a servitude given him in the estate leaver's property.¹

4. If a bequest be made on condition or *sub die*, or if the legatee or *fideicommissary* cannot demand the legacy for other causes, such as, if there be a dispute respecting the object of the legacy or *fideicommiss*, in consequence of which he cannot claim it at the time, then he may demand that the burdened person shall secure him by bail, with the caution *legatorum vel fideicommissorum servandorum causa*; and when this is not done a *missio in possessionem* (the putting into possession) follows.² On the other hand, the heir has the interdict *quod legatorum* for restitution against the legatee or *fideicommissary* who has wrongfully taken possession of the legacy or *fideicommiss* before the heir has entered into possession.³

D. THE RIGHT OF ACCRETION (*jus accrescendi*) IN LEGACIES AND FIDEICOMMISSA.⁴

§ 770. When the same thing is to be done or paid by the same heir to several persons,⁵ the latter are called, in relation to this thing, co-legatees (*collegatarii*), and a *jus accrescendi* takes place between them. But it only takes place—

1. When the estate leaver has not expressly forbidden it.⁶

2. When one of the co-legatees ceases to be such before the right to the legacy is vested in him, because otherwise his share is transmitted to his heirs.⁷

¹ Const. 3. § 2. C. 6. 43.

² Dig. 36. tit. 3. 4; Cod. 6. 54. See § 342, *supra*, note 6; Glück, Comm. Vol. 19, p. 166, note 63; Roszhirt, Vol. 1, p. 516, *seq.*

³ Dig. 43. 3; Cod. 8. 3.

⁴ On the ancient law: Gaius, II. §§ 199. 205–208. 215. 223. 286; Ulpian, XXIV. §§ 12. 13. On the modern law: § 8. I. 2. 20; Cod. 6. 51; Donellus, Comm. jur. civ. Lib. 8, c. 21; Holtius, Analyse historique du droit d'accroissement, Liège, 1830; Mayr, Das Recht der Anwachsung, p. 85, *seq.*; Glisson, Du droit d'accroissement, Paris, 1862. See the works cited in note 4, § 752, *supra*; Roszhirt, Vol. 1, p. 589, *seq.*

⁵ When the same property has been left to several persons by different heirs, these persons are not considered as co-legatees, and there is no *jus accrescendi*; but such vacant legacy remains to him who is to pay it: fr. 11. D. 7. 2. See also note 4, p. 580.

⁶ Because he is not prevented, as in the institution of an heir, by the rule, no one can die testate as to part and intestate as to the remainder. See § 754, *supra*.

⁷ There is an exception in the case of the legacy of a usufruct, because the share of one who ceases to be a legatee accrues to his co-legatee, even if it had already vested in the former: Dig. 7. 2; Fragm. Vatic. § 75–89; Merlen, Diss. de usufructu accrescendo, Erfurt, 1773; Heimsöeth, Diss. de usufructu accrescendo in jure Romano, Cologne, 1831.

3. It depends on the manner in which the co-legatees are connected. If a *re et verbis conjunctus* (the thing given combined with the words of the gift) cease to be such, his share accrues only to them who are conjoined with him; but if a simple *re conjunctus* (legatees joined in relation to the thing) cease to be such (*disjunctus*), it accrues to the remaining *re conjunctis* in proportion to their original shares.¹ Simple *verbis conjuncti* have no right of increase.²

4. The *disjunctus* (one not joined by either words or things) cannot evade the *jus accrescendi*, but it takes place *sine onere* (without burden) of the accruing portion. The *mixtim conjunctis* (without words of severance) may accept or refuse the vacant share, but this accrues *cum suo onere* (with burden).³

5. If one who has no co-legatees refuse a legacy, it remains to him who was to pay it.⁴

VII. THE LEX FALCIDIA.⁵

A. ITS SCOPE.

§ 771. The testator's right to burden his estate with legacies was by the Falcidian law (A. U. C. 714) subjected to an important restriction. This law⁶ prescribed that no one could bequeath more than three-fourths of his property in legacies, and that the heir should have at least one-fourth of the estate, and that should the testator violate this prescript the heir may have

¹ § 8. I. 2. 20; Const. un. § 11. O. 6. 51; fr. 80. D. 32; fr. 41. pr. D. 31.

² fr. 11. D. 7. 2. The contrary appears to be said in fr. 89. D. 32, but this passage does not speak of the *jus accrescendi*. See Glück, Comm. Vol. 43, p. 339, seq. The *jus accrescendi* does not take place between legatees to whom determinate real parts of the same property have been given: fr. 1. pr. D. 7. 2; fr. 84. § 12. D. 30.

³ Const. un. § 11. C. 6. 51.

⁴ fr. 44. § 1. D. 30; fr. 15. D. 34. 5; Const. un. § 11. C. 6. 51.

⁵ Gaius, II. § 224, seq.; Ulpian, XXIV. § 32; Paul, III. 8; Inst. 2. 22; Dig. 35. 2. and 3; Cod. 6. 59; Novel 1. c. 2; Theophilus, ad Inst. 2. 22; Donellus, Comm. jur. civ. Lib. 8, c. 22-27; Voorda, Commentar. ad Leg. Falc. Utrecht, 1730; Roszkirt, Vol. 1, p. 520, seq.

⁶ The design of this is to prevent the inheritance being reduced to little or nothing for the direct heir, who would then refuse it, and thus render nugatory the legacies and *fideicommissa*. This end was sought to be attained earlier by two other laws which proved insufficient. The *lex Furia testamentaria* (A. U. C. 571) forbids a person accepting a greater legacy than 1000 *asses*, and imposes as a penalty for the violation of this law the return of fourfold. Kin to the sixth degree, and in one case to the seventh degree, are excepted from the provisions of this law. The *lex Voconia* (A. U. C. 585) prescribes that he who is estimated at 100,000 sesterces or more shall not bequeath to any one person more than all the direct heirs together shall retain. Both of these restrictions were repealed by the Falcidian law: Cicero in Verr. I. 42. 43. pro Balbo c. 8; Quintilian, Declam. 246; Gaius, II. § 224-227; Ulpian, I. § 2. XXVIII. § 7; Vat. Fr. § 301; pr. I. 2. 22; Künd, De lege Voconia, Leipsic, 1820. See the works cited in note 1, p. 522, § 703, *supra*.

the right to make a proportional deduction from each legatee,¹ so far as this may be requisite to supply the deficiency in the fourth part. This part is now termed the *quarta Falcidia*; the Romans termed it simply *quarta* or *Falcidia*.

B. OF THOSE ENTITLED TO THE *quarta Falcidia*.

§ 772. The following have a right to this fourth :

1. Every testamentary or intestate direct heir,² but not a legatee or *fideicommissary* charged with the payment of a legacy or *fideicommiss*.³

2. If there be several co-heirs, each of them is entitled to a full fourth of his portion of the inheritance, even if the estate on the whole should not be too heavily burdened.⁴

3. If one of several co-heirs cease to be such, and his portion accrue to the others, the fourth is to be computed for each share separately. But the heir, to whom an unburdened share accrues, must allow the surplus over the fourth to be computed with the burdened fourth of his original portion.⁵

C. OF THE DEDUCTION OF THE FALCIDIAN FOURTH.

§ 773. Generally all legacies, *fideicommissa* and gifts in the event of death must contribute to the fourth,⁶ but not gifts *inter vivos*,⁷ unless they are of such a nature that they first become valid and effectual by the donor's death.⁸

¹ The Falcidian law (like the *lex Furia* and the above-mentioned provision of the *lex Voconia*) relates only to proper legacies, which may be imposed on the direct testamentary heir only. At a later period its scope was further extended. See § 772, note 2, and the beginning of § 773, *infra*.

² By the Falcidian law only the testamentary heirs, whether instituted or substituted, had this right (§ 770, *supra*, note 6); according to fr. 18. pr. D. 35. 2. it is now allowed to the intestate heirs.

³ fr. 47. § 1. D. 35. 2. fr. 55. § 2. fr. 22. § 5. D. 36. 1. But if the heir deduct from the legacy, the legatee may make a proportional deduction from the legacies with whose payment he is charged; but this must not be understood as giving him a right in this case to the Falcidian fourth: fr. 32. § 4. D. 35. 2.

⁴ § 1. I. 2. 22. fr. 77. D. 35. 2; *Bernstorff*, Diss de ratione legis Falcidie singulis hereditibus ponenda, Göttingen, 1754.

⁵ fr. 78. D. 35. 2. See fr. 1. §§ 13. 14. fr. 11. §§ 7. 8. fr. 87. §§ 3. 5. fr. 14. § 2. fr. 21. § 1. fr. 25. pr. D. 35. 2; *Sigmund*, Über die Berechnung die qu. Falcidia, München, 1846; *Gordon*, De legis Falcidie, Bonn, 1856. If the birthright portionees be so burdened with legacies that they have not even the birthright portion clear, then by the canon law they are allowed first to retain the birthright portion and from the remaining property to retain the *Falcidia*: cap. 16. 18. X. 3. 26. "*Raynaldus et Raynaldus*." By the Roman law they are entitled only to the birthright portion, or, if the fourth amount to more, then only to that: Const. 10. C. 6. 50; Const. 24. C. 3. 36; Novel 1. c. 1. § 1; *Glück*, Comm. Vol. 7, p. 450, *seq*.

⁶ Const. 2-5. C. 6. 50. See *supra*, note 1.

⁷ fr. 27. D. 39. 6.

⁸ Const. 12. C. 6. 50; Const. 2. C. 8. 57.

The deduction is generally to be made proportionally from all legacies and *fideicommissa*, unless the estate leaver have expressly directed that all necessary deductions shall be borne by one or more designated legatees.¹

D. COMPUTATION OF THE FALCIDIAN FOURTH.

§ 774. The following is the mode of computing the fourth :

1. To determine if, in a given case, the heir has the right to deduct from the legacies in order to supply the deficiency in the fourth, the amount of the inheritance, at the time of the estate leaver's death, must be considered. If the inheritance were not incumbered at that time, the legatees need not suffer a deduction, even if the inheritance should subsequently be so much diminished by misfortune that the original fourth does not remain to the heir; on the other hand, they must suffer the deduction if the inheritance be subsequently so much increased that the heir's fourth, which was originally incumbered, become disincumbered.²

2. The fourth is to be computed of the estate leaver's net estate, after the deduction of all debts and incumbrances of the inheritance and charges for the estate leaver's burial, and for making the inventory of the inheritance.³

3. The heir is chargeable only with what he receives from the estate as heir, and not with what he receives as legatee, and hence in a pre-legacy (an advance legacy) he is chargeable only with what he would have to pay to himself.⁴

4. In a legacy of certain incomes for life,⁵ whose value cannot be precisely estimated because of the uncertainty of life, such as an annual legacy, alimentation and usufruct, it depends on whether he to whom such legacy is given be the sole legatee or whether he have co-legatees. In the former case the legacy is to be paid to him in full, till by the continuous payments the fourth would be impaired, whereupon the succeeding payments are reduced backwards.⁶ In the latter case the deduction from the legacy necessary to supply the deficiency in the fourth is to be immediately computed, and in this computation regard must be had partly to the age of the legatee and partly to the probable duration of his life, according to the following table.⁷ The legacy of all the probable number of years which he may yet live is then

¹ fr. 88. § 2. fr. 64. D. 35. 2.

² § 2. I. 2. 22; fr. 73. pr. D. 35. 2.

³ § 3. I. 2. 22; fr. 1. § 19. fr. 36. § 2. fr. 72. D. 35. 2; Const. 6. pr. C. 6. 50.

⁴ fr. 74. fr. 76. pr. § 1. fr. 86. fr. 91. D. 35. 2. See *supra*, note 7, 573; *Rozshirt*, *supra*, p. 572.

⁵ On ordinary conditional legacies and *fideicommissa*, see fr. 45. § 1. fr. 73. § 2. D. 35. 2; fr. 15. § 6. fr. 66. pr. fr. 88. § 3. D. 35. 2. On those depending on time, see fr. 45. pr. fr. 66. pr. fr. 73. § 4. D. 35. 2. On recurring payments which are bequeathed not simply for life, but perpetually, see fr. 3. § 2. D. 35. 2.

⁶ fr. 47. pr. D. 35. 2.

⁷ fr. 55. fr. 68. pr. D. 35. 2. In the latter passage there is a twofold computation of the probable duration of life, namely :

to be considered as a whole, and from this is to be computed a proportional deduction for the fourth, and this is again to be divided among the several years.¹

E. WHEN THE RIGHT TO THE FALCIDIAN FOURTH DOES NOT EXIST.

§ 775. The right to deduct the Falcidian fourth does not exist—

1. *a.* In a soldier's testament, when he has testamentated *jure militari*.²
- b.* When the heir has not made a proper inventory.³
- c.* When the estate leaver has either expressly or tacitly forbidden the deduction of the fourth.⁴
- d.* And when the heir has either expressly or tacitly renounced his right.⁵
2. Nor is there a right to the Falcidian fourth in the following single legacies and *fideicommissa*, which may therefore be termed privileged legacies:
 - a.* Legacies and *fideicommissa* to pious purposes.⁶
 - b.* Legacies and *fideicommissa* of property which the testator forbade to alienate.⁷
 - c.* When a man gives his wife a legacy of things which had been procured for her.⁸

1. When one is aged—

Less than 20 years, it is presumed that he will yet live 30 years.

From 20 to 25	"	"	"	"	"	28	"
" 25 to 30	"	"	"	"	"	25	"
" 30 to 35	"	"	"	"	"	22	"
" 35 to 40	"	"	"	"	"	20	"
" 40 to 50	"	"	"	"	"	that which is lacking of 59 yrs.	
" 50 to 55	"	"	"	"	"	9	years.
" 55 to 60	"	"	"	"	"	7	"
Over 60	"	"	"	"	"	5	"

2. At the same time it is remarked that it is more usual to presume, as the duration of life, that one under thirty years will yet live thirty years, and that one over thirty years will live so many years as he lacks of sixty years: *Schmelser, De probabilitate vitæ*, Göttingen, 1788.

¹ *Konopak, Berechnung der Falcidischen Quart*, Rostock, 1811.

² Const. 7. C. 6. 50; fr. 17. 92. 96. D. 35. 2.

³ Const. 22. § 14. C. 6. 30; Novel 1. cap. 2. § 2.

⁴ By the ancient law he was not allowed to do this: fr. 15. § 1. fr. 27. D. 35. 2; fr. 81. § 4. D. 30; Const. 11. 18. C. 6. 50. Justinian first authorized this: Novel 1. cap. 2. § 2.

⁵ fr. 46. 71. D. 35. 2; Const. 19. C. 6. 50. It is regarded as a tacit renunciation when he fully pays a legacy knowingly or in ignorance of the law: Const. 9. C. 6. 50. But see fr. 16. D. 35. 2. and Novel 1. cap. 3; *Rosshirt*, Vol. 1, p. 586.

⁶ By the ancient law the legacy for pious purposes was not exempt from the deduction of the Falcidia, as clearly appears from fr. 1. § 5. D. 35. 2. and Const. 49. C. 1. 3, but it is certainly exempted from such deduction by Novel 131. c. 12. See Auth. *Similiter* C. 6. 50; *Glück*, Comm. Vol. 42, p. 145.

⁷ Novel 119. c. 11; Auth. *Sed et* C. 6. 50.

⁸ fr. 1. § 10. D. 35. 2. See fr. 1. § 12. D. 33. 4; fr. 81. §§ 1. 2. D. 35. 2; fr. 28. § 1. D. 30.

d. In every legacy which must be computed in the birthright portion,¹ and in every legacy which the heir has eloigned.² If there be privileged and unprivileged legacies in an inheritance, the unprivileged do not suffer by this connection, but the heir must bear the loss. He must abate as much as the privileged legacies must have contributed to the fourth had they been bound to contribute.

VIII. WHEN LEGACIES ARE INVALID.

A. FROM INCEPTION.

§ 776. A legacy may be invalid from its inception or may become so subsequently.³

It is invalid from its inception—

1. When it is bequeathed by an incapable person or left to a person incapable to receive it.
2. When at its creation some material thing has been omitted.
3. When what was bequeathed cannot be the object of a legacy. The latter case is governed by the Catonian rule⁴ by which the legacy is not validated by a change of circumstances before the estate leaver's death.⁵

B. SUBSEQUENT INVALIDITY OF A LEGACY.

1. *By Ademption.*

§ 777. A legacy or *fideicommiss* may become invalid subsequently⁶—

1. By ademption, which is a revocation of it by the testator.⁷ Such revocation requires no formalities,⁸ and may be made either in writing or verbally, expressly or impliedly. The revocation is implied when the testator cancels the legacy, when he destroys the object of the legacy or so changes it that it ceases to be the same thing, or if he alienate it without necessity,

¹ fr. 87. § 3. D. 31; Const. 36. pr. C. 3. 28.

² fr. 59. pr. D. 35. 2. A legacy of a debt is not a true exception. See fr. 1. § 10. D. 35. 2; fr. 1. § 12. D. 33. 4; fr. 81. §§ 1. 2. D. 35. 2; fr. 28. § 1. D. 30.

³ *Donellus*, Comm. jur. civ. Lib. 8, c. 16, 17.

⁴ fr. 1. pr. D. 34. 7. On this rule see *Donellus*, Lib. 8, c. 13; *Westphal*, Von Vermächtnissen, § 855-860.

⁵ This rule did not govern in conditional legacies and in legacies in which the legatee attains no right till after the entry into the inheritance: fr. 2-4. D. 34. 7. See *Rozshirt*, Vol. 1, p. 413, *seq.*

⁶ Legacies and *fideicommissa* created by disposition of last will become invalid—

1. When they have been created by a testament or testamentary codicil and the testament has become *irritum*, *ruptum* or *destitutum*. (See § 725-728, *supra*.)

2. When they have been created *ab intestato* in consequence of the estate leaver having lost the ability to validly declare his last will (§ 726, *supra*), as also when he made a testament with the view that the codicil should not be valid testamentarily (§ 756, *supra*, note 9).

⁷ Inst. 2. 21; Dig. 34. 4.

⁸ fr. 3. § 11. D. 34. 4; pr. I. 2. 21.

or if he during life give it to another.¹ In some cases ademption is presumed, namely, if after the making of the legacy enmity and hatred arise between the testator and the legatee, without reconciliation, or if the testator scandalize the legatee after making a bequest to him.²

2. *By Translation.*

§ 778. By translation is understood every change that the estate leaver makes in the legacy or *fideicommiss*.³ Thus, when instead of the property previously bequeathed he bequeaths something else; when he imposes on one person the payment of the legacy or *fideicommiss* instead of another on whom he had imposed it; when he bequeaths certain property to one which he had previously bequeathed to another; and when he changes the state of the legacy or *fideicommiss*.⁴ Every translation of a legacy or *fideicommiss* includes the ademption of the former and the making of a new legacy or *fideicommiss*. Hence all the formalities requisite in the creation of a legacy or *fideicommiss* are to be observed, otherwise it would be only an ademption and not a translation, and consequently neither the old nor the new legacy would be valid.⁵

3. *For Accidental Causes.*

§ 779. In many cases a legacy or *fideicommiss* becomes invalid without the testator's will. It is then termed an extinguished legacy (*legatum extinctum*). Among these are: when the legatee dies before the testator, or, if he should survive the testator, dies before the legacy has vested in him (§ 767, *supra*);⁶ when the condition on which the right to the legacy depends fails;⁷ when the legatee of property belonging to a third person acquires such property lucratively (such as by gift, but not by purchase) from another before the vesting of the legacy;⁸ and when the object of the legacy ceases to exist or becomes so changed in specie as to destroy the property in it.⁹

¹ fr. 16-18. D. 34. 4; fr. 85. § 2. D. 30; §§ 12. 21. I. 2. 20; Const. 27. C. 6. 42.

² fr. 3. § 11. fr. 4. fr. 13. D. 34. 4.

³ Inst. 2. 21; Dig. 34. 4.

⁴ fr. 6. pr. D. 34. 4; § 1. I. 2. 21; fr. 5. fr. 3. §§ 2. 2. fr. 10. fr. 24. pr. D. 24. 4.

⁵ §§ 12. 21. I. 2. 20; fr. 34. pr. D. 30.

⁶ Const. un. §§ 2. 4. 7. C. 6. 51.

⁷ See § 725-728. By the ancient law a legacy becomes invalid also when he who is charged therewith fails to accept the inheritance: fr. 29. §§ 1. 2. D. 31; Const. un. § 10. C. 6. 51.

⁸ § 6. I. 2. 20; fr. 34. §§ 1. 2. D. 30; fr. 31. § 1. fr. 66. §§ 1. 2. D. 32; fr. 17. 19. D. 44. 7; fr. 67. pr. fr. 72. § 4. D. 46. 3; W. Sell, *Aufhebungsart der Obl. durch concursus duar. causar. lucrativar.* Zurich, 1839; *Rechtsart.* Vol. 1, p. 446, *seq.*

⁹ § 16. I. 2. 20; fr. 89. pr. § 1. D. 22. On the case when one of several species ceases to exist, see fr. 1. 2. D. 33. 8; § 17-20. I. 2. 20; fr. 22. D. 30.

III. OF THE PERSONS IN UNIVERSAL FIDEICOMMISSA.

§ 783. The persons in a universal *fideicommiss* are—

1. The *fideicommittens*,¹ he who creates it, who can only be a person who has the power of testamentation (*testamenti factio active*).²
2. The *fideicommissarius*, he who is to receive it, who can only be a person who can take under a testament (*testamenti factio passive*).³
3. The *fiduciarius* (trustee), he on whom it is imposed, who may be any direct or *fideicommissary* heir.⁴

IV. MANNER OF CREATING AND ACQUIRING A UNIVERSAL FIDEICOMMISS.

§ 784. A universal *fideicommiss*, like a specific one, may be created by any testamentary disposition. It is valid without any form if the testator in writing or verbally impose it on the heir, in which case the *fideicommissary* may prove it only by the oath of the *fiduciarius* (*fideicommissum heredi præsentis injunctum*).⁵ (See § 761, *supra*.) The principles of the mode and acquisition of specific *fideicommissa* (§§ 766, 767, *supra*) are also applicable to universal *fideicommissa*.⁶

V. OPERATION.

A. ANCIENT OPERATION OF THE PARTITIO LEGATA.

§ 785. The *legatum partitionis* (partitioning of the legacy) had primarily the effect of obliging the heir to deliver to the *partiarius* (he to whom a part of a legacy was given) his share. Before Justinian's time the heir might satisfy this obligation by paying the value of the share in money.⁷ But if he preferred to divide his share with the legatee in kind, then neither the debts nor the credits of the inheritance passed to the legatee, and the heir alone was bound for the debts and entitled to the credits. Since by the testator's will the *partiarius* must pay his share of the debts which the heir is bound to pay, as of all *hereditaria damna* (losses of the inheritance), and since he is to receive his share of the assets collected by the heir, as of all *hereditaria lucra* (gains of the inheritance), therefore they were bound to give security to each other to pay their respective proportions and for the performance of their respective obligations.⁸ This was the law prior to Justinian's ordinance whereby legacies and *fideicommissa* were assimilated to each other. Since

¹ This designation, as well as those in div. 2 and 3, is used by the Romans in the *fideic. hered.*

² Ulpian, XXV. § 4; fr. 2. D. 30.

³ Ulpian, XXV. § 6; Gaius, II. § 284; fr. 67. § 3. D. 36. 1.

⁴ §§ 10. 11. I. 2. 23; fr. 1. § 6. D. 32; fr. 8. § 1. D. 29. 7.

⁵ § 2. I. 2. 25; § 12. I. 2. 23; Const. 32. C. 6. 42.

⁶ § 2. in fin. I. 2. 23. On the acquisition and transmission of a *fideicommiss*, see fr. 25. pr. fr. 44. pr. fr. 46. D. 36. 1; Const. 32. C. 6. 42.

⁷ fr. 26. § 2. fr. 27. D. 30; fr. 32. § 6. D. 33. 2.

⁸ Ulpian, XXV. §§ 14. 15; § 5. I. 2. 23.

that ordinance the universal *fideicommissa* have the same effect, whether mandatorily or petitorily created.

B. OPERATION OF THE FIDEICOMMISSARIA HEREDITAS.

1. According to the Trebellian *Senatusconsultum*.

§ 786. It is essential to the validity of a universal *fideicommiss* that the direct heir on whom it is imposed actually becomes heir (§ 782, *supra*), in which event the heir is bound for payment.¹ But if the direct heir have become heir, then, by the principles of the Roman law, once heir, always heir (*semel heres, semper heres*), he ceases not to be heir, even if he had to transfer the entire inheritance as a *fideicommiss*, and hence he may still sue the debtors to and be sued by the creditors of the inheritance. Originally the *fideicommissary* was very similar to a *partiarius*. Like the latter he was only a specific successor, and mutual stipulations were entered into between him and the direct heirs precisely as in the case of a *legatum partitionis* (§ 785, *supra*). This preceded a fictitious sale of the inheritance or inheritance portion which had to be paid, and according to the circumstances of the *fideicommiss* related either to a part or the whole.² It was first established by the Trebellian *senatusconsultum* (under Nero, A. U. 814), that after the transfer of the inheritance all actions which by the civil law might be instituted by or against the direct heir should, of right, be instituted by and against the *fideicommissary* as *utiles* actions, in proportion to his share of the inheritance. Hence the latter was quasi heir (*heredis loco*); by the transfer a universal succession was founded and the ancient fictitious sale and stipulations became unnecessary.³

2. According to the Pegasian *Senatusconsultum*.

§ 787. The direct heir, however, was always at liberty to accept or reject the inheritance, and the latter was to be feared, especially when he had to transfer the entire inheritance and retain no advantage. To render the *fideicommiss* effectual in this respect, the Pegasian *senatusconsultum* (under Vespasian) extended the *lex Falcidia* to universal *fideicommissa*, and the direct heir, burdened with a universal *fideicommiss*, was thereby authorized in every case to retain for himself at least the fourth part of the estate or of his inheritance portion; but, on the other hand, at the request of the *fideicommissary* he was legally bound to enter into the inheritance.⁴ He who was compelled to enter into the inheritance transferred his whole inheritance portion *ex*

¹ Hence the *fiduciarius* was obliged to give the *fideicommissary* fidejussorial security for the transfer of the inheritance: fr. 1. § 1. D. 36. 4; Const. 1. 4. O. 6. 54.

² Gaius, II. § 252.

³ Ulpian, XXV. § 14-16; Gaius, II. § 25. 3; § 4. I. 2. 23; fr. 1. § 2. D. 36. 1.

⁴ § 7. I. 2. 23. This fourth is termed in the sources simply *quarta* or *Falcidia* or *commodum legis Falcidiae*: fr. 16. § 9. fr. 22. § 2. fr. 27. § 10. fr. 30. D. 36. 1. The moderns term it the *quarta Trebelliana*, apparently from § 7. I. 2. 23.

Senatusconsulto Trebelliano. In like manner he who voluntarily entered and had the fourth clear transferred the quota which was imposed on him. In all these cases, from the moment of the transfer, the *fideicommissary* took the place of heir (*heredis loco*), and of course succeeded to the debts and credits of the inheritance (§ 786, *supra*). He who, on the other hand, entered voluntarily and had not the fourth clear, transferred *ex Senatusconsulto Pegasiano*, and thereupon both parties had to secure each other by mutual stipulations for their proportions of the assets and liabilities of the inheritance.¹

3. *According to the Union of the Trebellian Senatusconsultum with the Pegasian by Justinian.*

§ 788. Justinian united the law of the Pegasian *senatusconsultum* with that of the Trebellian, and from this union the following principles govern:

1. A direct heir burdened with a universal *fideicommiss* is entitled to retain for himself the fourth part of his inheritance portion (*quarta Trebelliani*, § 787, note 4, *supra*).

2. The entire or proportional debts and credits of the inheritance by the transfer always pass to the *fideicommissary*, hence the latter is always regarded as *heredis loco*.²

3. When the *fiduciarius* does not accept the inheritance voluntarily, but is compelled to accept it, he forfeits his right to the fourth and to all other advantages given by the estate leaver's last will.³

4. When the *fiduciarius* has accepted and is in possession of the inheritance, the *fideicommissary* may institute an action *personalis ex testamento* for the *fideicommiss*. If he be not in possession he must at least make a verbal transfer,⁴ and then the *fideicommissary* may institute the *fideicommissaria hereditatis petitio* against the possessor, who holds it *pro herede* (assuming to be heir) or *pro possessore* (assuming the possession).⁵

4. *Of the Trebellian Fourth.*

§ 789. The Trebellian fourth is naught but the application of the *Falcidia*⁶ to the universal *fideicommiss*, and hence it is generally to be adjudged by the same principles that govern the *Falcidia*.

¹ Gaius, II. § 254-259; Ulpian, XXV. § 14-16; §§ 5. 6. I. 2. 23. In the former case the *fideicommissary* was *heredis loco*, in the latter, *legatarii loco*.

² In other words, the inheritance is transferred *ex Senatusconsulto Trebelliano* when the *fiduciarius* has not the fourth clear and justly deducts it: § 7. I. 2. 23; Const. 7. § 1. C. 6. 49.

³ fr. 4. fr. 27. §§ 14. 15. fr. 43. fr. 55. § 3. fr. 28. § 1. D. 36. 1.

⁴ This may be done with the same effect when he is in possession.

⁵ fr. 37. pr. fr. 63. pr. D. 36. 1; Dig. 5. 6. See § 747, *supra*.

⁶ The Romans always term it the *quarta* or the *Falcidia*: Moeller, De quarta Trebellianica quam vocant et utrum aliqua parte differat a quarta Falcidia, Heidelberg, 1815.

1. Therefore only the direct heir is entitled to deduct it, and not a *fideicommissary* burdened with a *fideicommiss*.¹

2. When several direct heirs are named, burdened with universal *fideicommissa*, each may retain the fourth of his inheritance portion for himself.²

3. The deduction is made from the entire mass, except when the heir is permitted to retain a sum of money or a specific thing whose value is equal to a fourth part of the inheritance.³

4. Only what he receives from the inheritance as heir can be computed in the fourth, and not what he receives as legatee.⁴

5. In all the cases in which the *Falcidia* cannot be deducted from specific *fideicommissa* (§ 775, *supra*), it cannot be deducted from universal *fideicommissa*; ⁵ hence, by a late ordinance of Justinian's, it cannot be deducted when the estate leaver has forbidden it.⁶

5. When the Transfer should be Made.

§ 790. The *fiduciarius* must transfer the *fideicommiss* at the time designated by the testator, and if the latter designate no time, then immediately after the entry into the inheritance.⁷ In either case the *fiduciarius* may require the reimbursement of the necessary and useful costs and charges expended by him on the *fideicommiss* or for the *fideicommissary*; for the costs for improvements (*impensæ voluptuariæ*) he has only the right to deduct (*jus tollendi*);⁸ on the other hand, he is liable for the damages caused by him.⁹

6. Inalienability of *Fideicommissa*.

§ 791. While the *fiduciarius* is in the possession and enjoyment of the *fideicommiss*, though he be the owner thereof, yet generally he cannot aliene

¹ The reason is, when the inheritance has been entered on, then the testator's will is confirmed ("Cum semel adita est hereditas, omnis defuncti voluntas rata constituitur"): fr. 55. § 2. fr. 22. § 5. D. 36. 1. On the exceptions, see fr. 1. § 19. fr. 63. § 11. fr. 55. § 2. D. 36. 1.

² arg. § 1. I. 2. 22.

³ § 9. I. 2. 23.

⁴ Gaius, II. § 254; Gaius, Epit. Lib. 2. tit. 7. pr. See fr. 74. fr. 30. § 7. D. 35. 2. On fr. 86. fr. 91. D. 35. 2, Const. 24. C. 3. 36, see Cujas, Obs. Lib. 8, c. 3, 4. On the fruits to be transferred by the *fiduciarius*, see fr. 18. pr. §§ 1. 2. fr. 22. § 2. fr. 27. § 1. D. 36. 1; Const. 6. pr. C. 6. 49.

⁵ fr. 1. § 18. fr. 3. § 1. fr. 4. fr. 45. D. 36. 1.

⁶ Novel 1. c. 2. § 2. See thereon § 775, note 4. When indefeasible heirs are burdened with a universal *fideicommiss*, they are allowed by the canon law the birthright portion, besides a fourth of the remaining property: cap. 16. 18. X. 3. 36. "Raynulfus et Raynaldus."

⁷ fr. 41. § ult. D. 32.

⁸ fr. 19. § 2. fr. 22. § 3. D. 36. 1; fr. 58. D. 30; fr. 40. § 1. D. 12. 6.

⁹ fr. 22. § 3. D. 36. 1; Hesse, Von der Culpa, 2d ed. p. 207.

the necessary appurtenances thereof,¹ excepting to pay inheritance debts, or to avoid damages to the *fideicommissary*,² or when the testator has permitted it,³ or when all the interested parties have assented thereto.⁴ If he in other cases have aliened property appertaining to the *fideicommiss*, then the alienation is invalid; and though he cannot avoid it, yet it may be avoided by the *fideicommissary* in the *utilis rei vindicatio* as soon as he becomes quasi heir. The *fideicommissary* has also for the security of his claim for the transfer of the *fideicommiss* a lien on the inheritance portion of the heir who should transfer.⁵ When, on the other hand, the *fiduciarius* was only bound to leave to the *fideicommissary* the residue of the inheritance remaining at the death of the *fiduciarius* (*fideicommissum ejus, quod superfuturum est*), then by the modern law the *fiduciarius* may freely dispose of three-fourths of the inheritance, leaving only one-fourth to the *fideicommissary*, for which, however, he must give security.⁶

VI. EXTINCTION OF UNIVERSAL LEGACIES AND FIDEICOMMISSA.

§ 792. Besides the cases when the disposition in which a universal legacy or *fideicommiss* is instituted is or becomes invalid,⁷ it also becomes extinct in the following cases:

1. When the *fideicommissary* renounces it.⁸
2. When he dies previous to the vesting of his right.
3. When the condition on which his right depends is not performed.⁹
4. When the family for whose benefit it is given becomes extinct,¹⁰ or when all the members of the family agree to its extinguishment or alienation.¹¹

¹ By the ancient law the *fiduciarius* might freely aliene, and the *fideicommissary* had only a claim for the restitution of the value of the *fideicommiss* and for damages: fr. 3. § 3. fr. 19. § 2. fr. 70. § 1. D. 36. 1. By Justinian's later ordinance in Const. 3. § 2. 3. C. 6. 43; Novel 159. it is forbidden to aliene the property belonging to the *fideicommiss*, and for the benefit of the *fideicommissary* such alienation is invalid: *Roszkiert*, Vol. 1, p. 201, *seq.*

² fr. 144. § 14. D. 30; fr. 38. pr. D. 32; fr. 22. § 3. D. 36. 1; fr. 104. D. 46. 3.

³ Auth. *Contra*, C. 6. 49; fr. 70. § 3. fr. 71. 72. D. 31.

⁴ Const. 11. C. 6. 42; fr. 120. § 1. D. 30. There is still another exception, which is: when the *fiduciarius* is only obliged to leave the inheritance at his death, he may aliene some of the property, if such alienation be necessary for the appointment of a *dos* or *donatio propter nuptias*: Novel 39. c. 1. See Novel 108. c. 1.

⁵ Const. 1-3. C. 6. 43; Novel 108. c. 2; Novel 159. See § 345, note 7, *supra*.

⁶ On the ancient law, see fr. 54. fr. 58. §§ 7. 8. D. 36. 1; fr. 70. § 3. fr. 71. 72. D. 31; *Westphal*, Von Vermächtnissen und Fideicommissen, Part 2, p. 1146. On the modern law, see Novel 108. c. 1. 2; *Roszkiert*, Vol. 1, p. 154.

⁷ Const. 29. C. 6. 42.

⁸ Const. 26. C. 6. 42. See Const. 1. 16. C. 2. 3; Const. 11. C. 2. 4.

⁹ fr. 102. D. 35. 1; Const. 30. C. 6. 42; Const. 3. § 3. C. 6. 43.

¹⁰ fr. 78. § 3. D. 31. See § 782, *supra*, note 6.

¹¹ Const. 11. C. 6. 42. See § 791, *supra*.

CHAPTER IV.

OF THE MORTIS CAUSA DONATIO ET CAPIO.¹

I. MORTIS CAUSA DONATIO.

A. NATURE.

§ 793. A gift in the event of death (*mortis causa donatio*) occurs—

1. When one, because of an imminent peril of life, makes a gift to another.²

2. When one, without reference to any particular danger, but yet in view of death, gives to another some of his property.³ In both the foregoing cases the operation of the gift in the event of death is limited in that the donor may revoke the gift during life, if he have not renounced such right, and that if the donee die first, the gift necessarily becomes invalid.⁴ In the first case there is the further limitation that the gift becomes invalid if the donor survive the peril in view of which he gave.⁵ The co-operation of the donee is as essential to the making of such a *mortis causa donatio* as it is to a gift between the living. The same rules that govern the formalities to be observed in gifts between the living govern this gift,⁶ excepting that by Justinian's ordinance the judicial acquiescence in large gifts in the event of death is not necessary when five witnesses attest them.⁷

B. ITS LEGAL NATURE.

§ 794. The *mortis causa donatio* has in common

A. With a legacy or *fideicommiss* that the beneficiary acquires no vested right to it till the death of the donor (§ 795, *infra*). This caused that several rules which originally were applicable to legacies and *fideicommissa* were by express directions extended to this donation. Thus it was subjected⁸ to the deduction of the *Falcidia* (§ 773, *supra*, note 6),⁹ and the right of increase, as it occurs in legacies and *fideicommissa*,¹⁰ as well as the Mucianian

¹ § 1. I. 2. 7; Dig. 39. 6; Cod. 8. 57; *Donellus*, Comm. jur. civ. Lib. 14, cap. 33; *Müller*, Über die Natur der Schenkung auf den Todesfall, Gießen, 1827; *Foster*, De mort. causa donat., Heidelberg, 1841; *Savigny*, System, Vol. 4, p. 239, *seq.*; *Rosshirt*, Vol. 1, p. 80, *seq.*

² § 1. I. 2. 7; Theophilus ad h. l.; fr. 26. pr. D. 16. 3; fr. 2-7. fr. 29. D. 39. 6.

³ § 1. I. 2. 7; fr. 1. 2. D. 39. 6.

⁴ fr. 13. § 1. fr. 26. fr. 27. fr. 35. §§ 2. 4. fr. 42. § 1. D. 39. 6; Novel 87. c. 1.

⁵ See note 2.

⁶ Vat. fr. § 249; Const. 1. C. Th. 8. 12; Const. 25. C. 8. 54.

⁷ Const. 4. C. 8. 57. See *Savigny*, p. 261, *seq.*

⁸ The *lex Furia* and the *lex Voconia* (§ 771, *supra*, note 6) related to *mortis causa donationes* as well as to legacies: *Gaius*, II. §§ 225, 226; IV. § 23; *Ulpian*, I. § 2. See also note 7, p. 594.

⁹ fr. 27. D. 39. 6; Const. 5. C. 6. 50; Const. 2. C. 8. 57.

¹⁰ Const. un. § 14. C. 6. 51. of Justinian.

security,¹ was extended to it. A number of the classical jurists favored the analogous application to *mortis causa donationes* of other rules governing legacies and *fideicommissa*, and this view was adopted by Justinian.² Thus,³ respecting the contesting of these gifts by creditors, by the Justinian law the same rules apply as in similar cases in legacies and *fideicommissa*;⁴ and a donation in the event of death may be burdened with legacies and *fideicommissa* as if it had been left by testament.⁵

B. The *mortis causa donatio*, however, is a kind of donation with which are connected, besides the characteristic that the donee must co-operate in the act, the following rules by which it is substantially distinguished from legacies and *fideicommissa*:

1. The capacity to give⁶ or take by testament⁷ is not requisite for its validity, but the ability to make a gift is requisite.⁸
2. There is no burdened person.
3. It does not depend on the codicillary form (§ 793, *supra*).
4. The donor may renounce his right of revocation (§ 795, *supra*).
5. Its validity and effectiveness do not depend on the acceptance of the inheritance nor upon the person accepting it.⁹
6. He who unsuccessfully contests a testament as fraudulent or inofficious does not therefore lose the *mortis causa donationes* given to him by the estate leaver.¹⁰
7. A *mortis causa donatio*, except as to its revocability, has the same effect and creates the same legal remedies as a gift between the living.¹¹
8. It never produces a universal succession.¹²
9. The interdict *quod legatorum* is not applicable to it.¹³

¹ Novel 22. c. 44. of Justinian.

² Savigny, System, p. 267, *seq.*

³ Other examples are: 1. In fr. 3. pr. fr. 5. § 7. fr. 20. pr. D. 37. 5; 2. In fr. 7. D. 39. 6; fr. 32. D. 24. 1; 3. In fr. 1. § 2. D. 7. 9; 4. In fr. 8. § 3. D. 28. 7; 5. In fr. 15. D. 39. 6; 6. In fr. 8. § 1. D. 2. 15.

⁴ fr. 17. D. 39. 6. So also when the patron seizes it because of an injury to his birthright portion: fr. 1. § 1. D. 38. 5. See Glück, Comm. Vol. 7, p. 108, *seq.*; Vol. 36, p. 138; Francke, Notherbenr. p. 535, *seq.*

⁵ fr. 11. D. 33. 4; fr. 77. § 1. D. 31; Const. 1. C. 8. 57; Const. un. § 8. C. 6. 51.

⁶ The contrary is not proved by fr. 32. § 8. D. 24. 1; fr. 7. § 6. D. 39. 5; fr. 1. § 1. D. 27. 3. See Fester, *supra*, p. 20, *seq.*; Savigny, p. 259, *seq.*

⁷ The provisions of the *Lex Julia et Papia Poppæa* on incapacity were by a *senatusconsultum* extended to *mortis causa donationes*: fr. 9. 35. 37. D. 39. 6; Vat. fr. § 259.

⁸ This is explained by fr. 25. § 1. D. 39. 6.

⁹ fr. 32. D. 39. 6.

¹⁰ fr. 5. § 17. D. 34. 9.

¹¹ On fr. 1. § 2. fr. 2. D. 6. 2, which are regarded as authority for the opinion that the property passes *ipso jure* the same as the things given as legacies by the testator. See Savigny, p. 245, *seq.*

¹² Nor does a gift between the living produce it.

¹³ fr. 1. § 5. D. 43. 3.

10. When a yearly rent is the object of a *mortis causa donatio*, it is regarded only as a gift,¹ while the annual legacy is considered as including several legacies (§§ 764, 767, *supra*).

11. Should the estate leaver revoke all legacies and *fideicommissa*, the *mortis causa donationes* are not revoked unless expressly mentioned.

C. OF ITS EXTINCTION.

§ 795. A donation in the event of death is extinguished—

1. When the donor revokes it,² which he may do at any time if he have not specially waived this right (*ne revocetur*).³ If, however, the gift be made with reference to a particular peril of life, in which the donor was, and he survive the peril, it is extinguished without special revocation.⁴

2. When the donee dies before the donor.⁵ If a *mortis causa donatio* become invalid for any cause, the donor or his heirs may recover in the *rei vindictio* the corporeal property given, if it be still in specie,⁶ and if other objects be given, or the property have ceased to exist, they may institute the *condictio sine causa* or an action *in factum*.⁷

II. MORTIS CAUSA CAPIO.

§ 796. By *mortis causa capio* in its wide sense is understood everything that a person acquires by the death of another; such as inheritances, legacies, *fideicommissa*, and donations in the event of death. In its narrow sense, however, it includes only those acquisitions in the event of death which have no other distinctive names,⁸ which are—

1. That which one is to receive from another, in the event of death, for the performance of a condition.¹⁰

¹ fr. 35. § 7. D. 39. 6.

² The principles of the redemption of legacies apply to this. See § 777, *supra*.

³ fr. 13. § 1. fr. 35. § 4. D. 39. 6.

⁴ § 1. l. 2. 7; fr. 29. D. 39. 6.

⁵ fr. 26. D. 39. 6.

⁶ The rights consequent on a *mortis causa donatio* may be such that when the donation continues valid they may not be enforced till the donor's death, or that when the donation becomes invalid restitution may be demanded. The former is the case in gifts on which claims are founded against the donor, or rather against his heirs: fr. 34. D. 39. 6. The latter is to be assumed in doubtful cases when the gift has been executed, such as an act whereby property is transferred: fr. 1. pr. D. 39. 5. But it may also be agreed that the property shall not vest till the donor's death: fr. 2. in fin. fr. 29. D. 39. 6; *Savigny*, p. 246, *seq.*

⁷ This is especially permitted in the last case mentioned in note 6, and was so even in Ulpian's time, notwithstanding that the property may have been delivered: fr. 29. D. 39. 6.

⁸ fr. 18. § 1. fr. 35. § 3. fr. 37. § 1. D. 39. 6.

⁹ fr. 31. pr. fr. 38. D. 39. 6; *Loeffler*, Diss. de mortis causa capionibus, *Leipae*, 1751; *Rosshirt*, Die Lehre von den Vermächtnissen, Vol. 1, p. 78, *seq.*

¹⁰ fr. 1. § 8. fr. 30. § 7. fr. 91. D. 35. 2; fr. 36. 38. D. 39. 6; *Rosshirt*, *supra*, pp. 79, 376, *seq.*

2. A gift which vests by the death of a third person prior to the donee's death.¹

3. The *dos receptitia*, which on the death of the wife returns to him who gave it.²

4. All that one receives for accepting an inheritance,³ or for rejecting it so that it may descend to the substitutes or intestate heirs.⁴

¹ fr. 18. pr. D. 39. 6.

² fr. 31. § 2. D. 39. 6.

³ fr. 21. D. 39. 6.

⁴ fr. 8. pr. D. 39. 6. Or for surrendering a legacy or *fideicommissa*: fr. 31. § 2. D. 39. 6.

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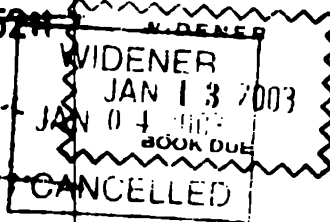
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